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United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 14821
CIVIL

CHAIN INSTITUTE, INC.; AMERICAN CHAIN & CABLE COMPANY, INC.; THE BRIDGEPORT CHAIN & MANUFACTURING COMPANY; THE McKAY COMPANY; HODELL CHAIN COMPANY; ST. PIERRE CHAIN CORPORATION; S. G. TAYLOR CHAIN COMPANY; CLEVELAND CHAIN & MANUFACTURING COMPANY; COLUMBUS McKINNON CHAIN CORPORATION; CAMPBELL CHAIN COMPANY; NIXDORFF-KREIN MANUFACTURING COMPANY; PEERLESS CHAIN COMPANY; ROUND CALIFORNIA CHAIN COMPANY; THE JOHN M. RUSSELL MANUFACTURING COMPANY, INC.; SEATTLE CHAIN & MFG. COMPANY; TURNER & SEYMOUR MANUFACTURING COMPANY; WESTERN CHAIN PRODUCTS COMPANY; WOODHOUSE CHAIN WORKS; DENNIS A. MERRIMAN; WILLIAM D. KIRKPATRICK; and GEORGE J. CAMPBELL, JR.,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

JOINT AND SEVERAL PETITION AND SUPPLEMENTAL PETITION TO REVIEW ORDER OF FEDERAL TRADE COMMISSION

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FILED

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United States Court of Appeals

FOR THE EIGHTH CIRCUIT

CHAIN INSTITUTE, INC.;
AMERICAN CHAIN & CABLE COMPANY, INC.;
THE BRIDGEPORT CHAIN & MANUFACTURING COMPANY;
THE McKAY COMPANY;
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ROUND CALIFORNIA CHAIN COMPANY;
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TURNER & SEYMOUR MANUFACTURING COMPANY;
WESTERN CHAIN PRODUCTS COMPANY;
WOODHOUSE CHAIN WORKS;
DENNIS A. MERRIMAN;
WILLIAM D. KIRKPATRICK; and
GEORGE J. CAMPBELL, JR.;

Petitioners,

against

FEDERAL TRADE COMMISSION,

Respondent.

JOINT AND SEVERAL PETITION TO REVIEW ORDER OF FEDERAL TRADE COMMISSION

To the Honorable Judges of the United States Court of Appeals for the Eighth Circuit:

Now come your petitioners, Chain Institute, Inc., a corporation; American Chain & Cable Company, Inc., a corporation; The Bridgeport Chain & Manufacturing Company, a corporation; The McKay Company, a corporation;

Hodell Chain Company, a corporation; St. Pierre Chain Corporation, a corporation; S. G. Taylor Chain Company, a corporation; Cleveland Chain & Manufacturing Company, a corporation; Columbus McKinnon Chain Corporation, a corporation; Campbell Chain Company, a corporation; Nixdorff-Krein Manufacturing Company, a corporation; Peerless Chain Company, a corporation; Round California Chain Company, a corporation; The John M. Russell Manufacturing Company, Inc., a corporation; Seattle Chain & Mfg. Company, a corporation; Turner & Seymour Manufacturing Company, a corporation; Western Chain Products Company, a corporation; Woodhouse Chain Works, a corporation; Dennis A. Merriman, an individual; William D. Kirkpatrick, an individual; and George J. Campbell, Jr., an individual, by their attorneys, and jointly and severally present this their Joint and Several Petition to Review a certain Order of the respondent Federal Trade Commission (hereinafter sometimes referred to as the "Commission") made and entered on the 16th day of February, 1953, in a certain proceeding before said Commission entitled "In the Matter of Chain Institute, Inc., an incorporated trade association, its directors, officers, and members, et al., Docket No. 4878", and in support thereof respectfully show:—

I.

The Nature of the Proceedings as to Which Review Is Sought.

1. On December 22, 1942, the Commission issued a complaint naming as respondents all of the corporations and individuals who are petitioners here, and also naming a corporation (Pyrene Manufacturing Company) which subsequently sold its chain business and is not a petitioner here, and also naming certain individuals against whom,

by reason of death and/or the dismissal of the amended complaint against them, are not petitioners here.

2. Said complaint alleged, in substance, that the respondents named therein had engaged in an alleged conspiracy in restraint of interstate competition in the manufacture, sale and distribution of welded chain, weldless chain, tire chains, and chain products, and that said respondents had performed various alleged acts pursuant to and in furtherance of such alleged conspiracy, all of which was alleged to be in violation of Section 5 of the Federal Trade Commission Act, Title 15 U. S. C., Section 45.

3. Thereafter, the said respondents moved to defer proceedings in said matter until the termination of World War II, and the Commission on December 10, 1943 issued an order fixing January 17, 1944 as the date for a preliminary hearing for the sole purpose of establishing a record of the identity, authenticity and genuineness of certain documents.

4. By order dated December 16, 1943, the Commission appointed Webster Ballinger as Trial Examiner in said proceeding.

5. On January 17 and 18, 1944, the preliminary hearing aforesaid was held before Webster Ballinger, Trial Examiner, at which documents were identified and authenticated as aforesaid.

6. On October 9, 1945, the Commission issued its amended complaint in said proceeding, naming as respondents the same corporations and individuals as were named in said original complaint.

7. Said amended complaint contained two counts instead of one. Count I, in substance, contained the same allegations as were contained in the single count of the original complaint and was directed against all the respondents. Count II was directed only against the corporate respondents and alleged, in substance, that they had discriminated in price between customers in alleged violation of Section 2 of the Clayton Act as amended by the Robinson-Patman Act, Title 15 U. S. C., Section 13, as amended.

11 8. All respondents named in the amended complaint filed answers thereto denying generally the allegations thereof.

9. Hearings were then held on the following dates, at which testimony and other evidence was offered and received on behalf of the Commission and on behalf of the said respondents:—April 15 and 25, 1946; May 15, 1946; June 18, 1946; July 15, 1946; August 6, 1946; September 9, 1946; October 22, 1946; January 21, 1947; February 10, 1947; April 2, 1947; May 6 and 27, 1947; June 10 and 23, 1947; September 30, 1947; October 1, 2 and 3, 1947; November 5, 6 and 7, 1947; December 9 and 10, 1947; January 12 and 26, 1948; February 9, 1948; March 2, 1948; June 9 and 10, 1948; and July 7, 1948. On the last-named
12 date the testimony was closed on the record.

10. On September 23, 1948, the Trial Examiner issued and filed his recommended decision, and on October 1, 1948 issued and filed an amendment thereto, and on October 6, 1948 issued and filed certain corrections thereto.

11. Briefs were filed and, on April 7, 1949, oral argument was heard by the Commission.

12. On November 22, 1949, the Commission advised counsel that, subsequent to the oral argument of April 7, 1949, changes had occurred in the membership of the Commission. The respondents were offered the alternative either of rearguing the matter before the Commission on January 20, 1950 or of letting the Commission as reconstituted consider the transcript of the former argument, as well as the record of the case, in reaching a decision. 13

13. The respondents elected to reargue the matter, and reargument was scheduled for January 20, 1950, but was successively postponed until September 22, 1950, when it was held. 14

14. On February 16, 1953, the Commission issued and filed its order disposing of exceptions to the Trial Examiner's recommended decision, and also its Findings as to the Facts and Conclusion, Order to Cease and Desist, and Dissenting Opinion of Commissioner Lowell B. Mason.

15. Copies of said Findings as to the Facts and Conclusion, Order to Cease and Desist, and Dissenting Opinion of Commissioner Lowell B. Mason were mailed to the said respondents by registered mail on February 20, 1953, by the Commission.

A copy of said Findings as to the Facts and Conclusion, Order to Cease and Desist, and Dissenting Opinion of Commissioner Lowell B. Mason is annexed to this petition, marked "Exhibit A", and hereby made a part hereof. 15

II.

The Facts and Statutes Upon Which Venue Is Based.

Statutes

This Court has venue and jurisdiction by virtue of Section 5 (c) of the Federal Trade Commission Act [15 U. S. C. § 45 (c)], which, insofar as pertinent, reads as follows:

"(c) Any person, partnership or corporation required by an order of the Commission to cease and
17 desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commission. Upon such filing
18 of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission * * *"

In addition, Section 5 (d) of the Federal Trade Commission Act [15 U. S. C. § 45 (d)] provides as follows:

"(d) The jurisdiction of the circuit court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive."

With respect to the service of orders of the Commission, the following provisions of Section 5 (f) of the Federal Trade Commission Act [15 U. S. C. § 45 (f)] are pertinent:

"(f) • • • orders • • • of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) • • •; or (c) by registering and mailing a copy thereof addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. • • •."

Facts

The facts upon which the venue and jurisdiction of this Court are based are as follows:

1. Petitioner Nixdorff-Krein Manufacturing Company, a corporation, has its principal office and manufacturing plant located in St. Louis, Missouri, within this Circuit. Petitioner Peerless Chain Company, a corporation, has its principal office and manufacturing plant located in Winona, Minnesota, within this Circuit.

2. Most if not all of the petitioners have sold and shipped and now sell and ship chain and chain products in or into some or all of the States of Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota, within this Circuit.

3. Certain of the alleged acts and practices of the petitioners described in the said complaint and amended complaint and found by the Commission in its said Findings as to the Facts and Conclusion, and covered by its said Order to Cease and Desist, were individually used by many of the petitioners within this Circuit and, by reason of the said charge and alleged finding of alleged conspiracy in such use, are attributable, for the purpose of venue and jurisdiction in this Court, to all of the petitioners herein.

23 4. Most if not all of the petitioners herein have individually used within this Circuit one or more of the delivered pricing methods described in the said complaint and amended complaint and in the aforesaid Findings as to the Facts and Conclusion, and covered by the said Order to Cease and Desist, and, by reason of the charge and alleged finding by the Commission of alleged conspiracy in the use of such methods by all of the petitioners, the use of such methods within the Circuit is, for the purpose of venue and jurisdiction in this Court, attributable to all of the petitioners herein.

III.

The Relief Prayed.

24 Petitioners respectfully pray this Court for the following relief:

1. That a copy of this petition be forthwith served by the Clerk of this Court upon the respondent Federal Trade Commission in the manner set forth in Rule 27 (a) of the Rules of this Court, and that said Commission be required forthwith, in conformity with Section 5 (c) of the Federal Trade Commission Act, to certify and file in

this Court a transcript of the entire record in the proceeding before it entitled, as aforesaid, "In the Matter of Chain Institute, Inc., an incorporated trade association, its directors, officers, and members, et al., Docket No. 4878", including all the evidence taken and the report and order of the Commission.

2. That this Court review the said proceeding and the Commission's said Order to Cease and Desist and enter an order setting aside the Commission's said Findings as to the Facts and Conclusion and said Order to Cease and Desist (except such portions of said Order as dismiss Count II of said amended complaint as to all of the respondents named therein, and dismiss Count I of said amended complaint as to certain respondents named therein) or in the alternative, modifying said Findings as to the Facts and Conclusion and said Order to Cease and Desist by eliminating therefrom such findings, provisions and terms as are not supported by the evidence or by the law.

3. And that this Court grant these petitioners such other and further relief as to this Court may seem just.

IV.

The Points Upon Which the Petitioners Intend to Rely.

The petitioners contend that the Commission's said Findings as to the Facts are, in many respects, not supported by the evidence, or are incomplete or misleading in the absence of additional material facts which are established by substantial and uncontradicted evidence but not found by the Commission; that the Commission's said Conclusion is erroneous as a matter of fact and as a matter of law; that the Commission's said Order to Cease and Desist is erroneous and illegal in that it is not supported

by validly-made findings of fact and in many respects goes beyond the matters alleged in the complaint and amended complaint and exceeds the power, authority and jurisdiction of the Commission and is in many respects so vague, indefinite and uncertain that petitioners cannot, with legal safety, conduct their business in an entirely lawful manner under it. More specifically, but without limitation, petitioners contend:

1. That the alleged finding or conclusion of the Commission to the effect that "this proceeding is in the interest of the public" is erroneous insofar as the Commission's
29 said Findings as to the Facts, Conclusion and Order to Cease and Desist are not supported by the evidence or are incomplete or misleading or are erroneous as a matter of fact or law or are illegal or are in excess of the Commission's authority, power or jurisdiction, or are vague, indefinite or uncertain; and specifically (but without limiting the generality of the foregoing) said alleged finding or conclusion of the Commission that "this proceeding is in the interest of the public" is erroneous insofar as it applies to the paragraph of the said Order to Cease and Desist which, in substance, prohibits the corporate respondents individually and regardless of any conspiracy, combination, understanding, agreement or planned common course of action, from using any of the delivered pricing methods
30 described in said paragraph "for the purpose or with the effect of systematically matching the delivered-price quotations or the delivered prices of other sellers of chain or chain products".

2. That the Commission's alleged findings of fact to the effect that the Chain Institute, Inc. and certain individuals who were respondents before the Commission, or any of them, participated in any alleged conspiracy or

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in any alleged formation or putting into effect of any alleged unlawful methods, systems, practices or policies, are not supported by the evidence, are contrary to the evidence in the record, and are erroneous, illegal and void.

3. That the Commission's alleged finding of fact to the effect that competition between and among manufacturers of chain and chain products has been restrained, lessened or destroyed, is not supported by the evidence, is contrary to the evidence in the record, and is erroneous, illegal and void.

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4. That the Commission erred in refusing to make findings (although requested to do so) as to material and relevant facts concerning the lawful and non-collusive origin, history and development throughout the years since the early 1900's, of the respective delivered pricing methods presently used in the sale of the various types of chain and chain products, which facts were established by competent, relevant, material and uncontradicted evidence in the record.

5. That the Commission erred in refusing to make findings (although requested to do so) of material and relevant facts concerning said delivered pricing methods, to-wit, that there has been no conspiracy, agreement, collusion, or planned common course of action in either the

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adoption or continued use of any of said methods of selling; that the chain manufacturers never even discussed any of these methods among themselves; and that each chain manufacturer adopted and used the method or methods presently used by it as a matter of independent business judgment; all of which facts are established by competent, relevant, material and uncontradicted evidence in the record.

6. That the Commission's alleged finding of fact to the effect that the delivered price method of selling tire chains is sometimes referred to as the "zone delivered-price method or system" is not supported by the evidence, is contrary to the evidence in the record, and is erroneous, illegal and void.

7. That the Commission erred in refusing to make findings (although requested to do so) as to material and relevant facts concerning certain activities of the Chain Institute, Inc., to wit, that said Institute engaged in a
35 program for the standardization of welded chain in co-operation with the United States Bureau of Standards, and it carried on a statistical program in which individual members reported their monthly chain shipments and were furnished a composite report in which the individual shipments of other members were not disclosed, which said facts were established by competent, relevant, material and uncontradicted evidence in the record.

8. That the Commission erred in refusing to make findings (although requested to do so) as to material and relevant facts concerning the "program of checking on prices charged in past and closed transactions" which was adopted by the Chain Institute, Inc., to wit, that such pro-
36 gram as thus "adopted" was to be such that each member would report its prices charged in past and closed transactions; would receive only a composite report which would not disclose the prices charged by any other member or paid by any particular customer; and further that said program was, at a later meeting of the said Institute, tabled; and further that said program was never in fact put into operation; which said facts are all established by competent, relevant, material and uncontradicted evidence in the record.

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9. That the Commission's alleged findings of fact to the effect that there is substantial evidence in the record that present and future prices were allegedly agreed upon on the occasion of meetings of the Chain Institute, Inc. and that the said Institute was allegedly used as a means for promoting and maintaining adherence to the alleged agreed-upon prices, are not supported by the evidence, are contrary to the evidence in the record, and are erroneous, illegal and void.

10. That the Commission erred in refusing to make findings (although requested to do so) as to material and relevant facts concerning the purpose, effect (or lack of it), and time of cessation of, the discussions of prices in past and closed transactions in which some of the chain manufacturers sometimes engaged, which facts are established by competent, relevant, material and uncontradicted evidence in the record.

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11. That the Commission erred in placing any probative value upon, and in not utterly disregarding all letters in the record written by George J. Campbell, Sr. (deceased), and the letter from W. C. Perkins to A. P. Van Schaick (deceased), dated April 18, 1938 (Commission's Exhibit 84-B).

12. That the Commission's alleged findings of fact to the effect that the respondents in the proceeding before the Commission desired that prices be stabilized and expected respondent Dennis A. Merriman to exhort the chain manufacturers not to sell at less than their published prices, are not supported by the evidence, are contrary to the evidence in the record, and are erroneous, illegal and void.

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13. That the Commission's alleged findings of fact to the effect that Dennis A. Merriman impressed upon the

members of the Chain Institute, Inc. any views to the effect that each member should adhere strictly to its published prices, and that said Merriman aided the members in allegedly detecting those members who did not so adhere, and that there was an alleged plan of all members to prevent departures from prices allegedly established pursuant to any alleged "pricing systems", and that said Merriman contributed to such alleged plan, are not supported by the evidence, are contrary to the evidence in the record, and are erroneous, illegal and void.

14. That the Commission's alleged findings of fact to the effect that the respondents in the proceeding before the Commission were engaged in alleged activities to prevent sales at prices less than those in published list prices and published discounts therefrom and that any activities of the said respondents were for such alleged purpose, are not supported by the evidence, are contrary to the evidence in the record, and are erroneous, illegal and void.

15. That the Commission erred in refusing to make findings (although requested to do so) as to material and relevant facts concerning the benefits to the public and others of the so-called tire chain specifications program of the Chain Institute, Inc., and with respect to the availability of such specifications to the public, and with respect to the effect of such specifications in increasing competition in the sale of tire chains, which said facts are all established by competent, relevant, material and uncontradicted evidence in the record.

16. That the Commission's alleged findings of fact to the effect that the purpose of the freight rate books compiled by Charles Donley was to provide the sellers of welded chain with common delivery charge factors to be

included in the price of welded chain, and that it was more important that all sellers use the same factor than the correct freight rate, and that the chain manufacturers who were respondents in the proceeding before the Commission considered it more important that all sellers use the same delivery charge factor, are not supported by the evidence, are contrary to the evidence in the record, and are erroneous, illegal and void.

17. That the Commission erred in refusing to make findings (although requested to do so) as to material and relevant facts concerning the history of the so-called Donley freight book, the accuracy of the rates set forth therein, 44
the extent to which said book was used, or not used, by the various chain manufacturers, the use by some of said manufacturers of other freight rate services, and the lack of any agreement or understanding among the chain manufacturers that they would use the said Donley book, all of which facts are established by competent, relevant, material and uncontradicted evidence in the record.

18. That the Commission's alleged finding of fact to the effect that the prices appearing in the price lists published and disseminated by American Chain & Cable Company, Inc. were the result of alleged understandings and agreements between the respondents in the proceeding before the Commission is not supportd by the evidence, is contrary 45
to the evidence in the record, and is erroneous, illegal and void.

19. That the Commission erred in refusing to make findings (although requested to do so) as to material and relevant facts relating to the factors which made and kept American Chain & Cable Company, Inc. the alleged most important factor in the chain industry in the United States:

the extent to which the published prices of the chain manufacturers varied; the practice of American Chain & Cable Company, Inc. of distributing its new published price lists and discount sheets to all customers and competitors at the same time; the fact that all competitors of American Chain & Cable Company, Inc. were also its customers from time to time; that such competitors on occasions received copies of such published price lists and discount sheets from jobbers before receiving copies from American Chain & Cable Company, Inc.; that American Chain & Cable Company, Inc. never informed its competitors of prospec-
47 tive future price changes; that the level of chain prices has never remained static for any long period of time but has changed up or down frequently; that such uniformity of published prices and published discounts as may have existed was not caused by any agreement, understanding, combination, conspiracy or planned common course of action, but by normal and lawful economic conditions operating upon the independent judgment of the various manufacturers; all of which facts are established by competent, relevant, material and uncontradicted evidence in the record.

20. That the Commission's alleged finding of fact to the effect that the respondents in the proceeding before the Commission have been able to achieve an allegedly rela-
48 tively high degree of price identity in quoting and selling various types of chain is not supported by the evidence, is contrary to the evidence in the record, and is erroneous, illegal and void.

21. That the Commission erred in refusing to make findings (although requested to do so) as to material and relevant facts concerning the degree of price non-uniformity in the chain industry, to wit, that during a time when

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economic conditions were bordering on the inflationary 20% of the sales of chain manufacturers were at off-list, non-uniform prices, and that during the depressed business periods of 1932, early 1933, 1936 and 1938, such percentage of off-list, non-uniform prices was considerably higher than 20%, which facts are all established by competent, relevant, material and uncontradicted evidence in the record.

22. That the Commission's alleged finding of fact to the effect that certain allegedly higher prices bid by some manufacturers of tire chains to the Procurement Division of the United States Treasury Department were the result of alleged agreements and understandings between the manufacturers submitting such higher bids, is not supported by the evidence, is contrary to the evidence in the record, and is erroneous, illegal and void.

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23. That the Commission's alleged finding of fact to the effect that there was a relatively high degree of uniformity in the bids submitted to the Navy Department on welded and weldless chains is not supported by the evidence, is contrary to the evidence in the record, and is erroneous, illegal and void.

24. That the Commission's alleged findings of fact to the effect that prices are allegedly "determined" by alleged "pricing methods" allegedly used by the respondents in the proceeding before the Commission; that there is any "degree of adherence" to such alleged prices thus allegedly "determined"; and that there were "relatively few departures" from such alleged prices thus allegedly determined, except during business depressions, are not supported by the evidence, are contrary to the evidence in the record, and are erroneous, illegal and void.

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25. That the Commission erred in refusing to make findings (although requested to do so) as to material and relevant facts, relating to the license agreements on patented bar-reinforced tire chains, to wit, the extent to which each licensee performed manufacturing, processing and finishing operations in connection with said bar-reinforced chains sold by it; and the number, types and differing prices of reinforced tire chains made by non-licensee tire chain manufacturers in competition with said bar-reinforced tire chains, all of which facts were established by competent, relevant, material and uncontradicted evidence in
53 the record.

26. That the Commission's alleged finding of fact to the effect that various respondent manufacturers in the proceeding before the Commission, with the aid of certain other respondents (against whom the complaint was dismissed by the Commission) allegedly conspired and agreed as to prices bid by said respondents, is not supported by the evidence, is contrary to the evidence in the record, and is erroneous, illegal and void.

27. That the Commission erred in refusing to follow its Trial Examiner's recommendation that those portions of the amended complaint relating to the license agreements on bar-reinforced tire chains, and relating to the
54 alleged arrangements of certain respondents with Shirley, Olcott & Nichols, be dismissed as to all respondents in the proceeding before the Commission.

28. That the Commission's alleged findings of fact to the effect that the published list prices on standard tire chains were uniform for the respondents (in the proceeding before the Commission) selling tire chains; that sales of standard tire chains were generally made in accordance

with the published list prices; that there was any plan, program, conspiracy, attempt or effort to maintain allegedly "established uniform" prices on standard tire chains; that there were any "established" prices, uniform or otherwise, on standard tire chains; that it was allegedly "necessary" that the prices on bar-reinforced tire chains be fixed and maintained at a level substantially higher than the level of prices on standard tire chains; that there was any conspiracy to fix or maintain prices on bar-reinforced tire chains; that there was any "over-all" (or any other) conspiracy or combination to fix or maintain prices on chain or chain products; that American Chain & Cable Company, Inc. and its licensees fixed or maintained prices on bar-reinforced tire chains; that there was any combination or conspiracy between American Chain & Cable Company, Inc. and its licensees; that there were any understandings or agreements between the manufacturers selling standard tire chains as to the prices at which standard tire chains would be offered for sale or sold to the Government or any other purchasers; and that there were any "unlawful acts and practices" with respect to bar reinforced tire chains; are not supported by the evidence, are contrary to the evidence in the record, and are erroneous, illegal and void.

29. That each and all of the Commission's alleged findings of facts (including but not limited to conclusions of the Commission) contained in "Paragraph Nine" and "Paragraph Ten" of the Commission's said "Findings as to the Facts and Conclusion", and in each and every paragraph, sentence and part thereof, are not supported by the evidence or by the valid findings of fact made by the Commission, are contrary to the evidence in the record and to such valid findings and to the findings of fact which

58 the Commission should have made, and are erroneous, illegal and void.

30. That the alleged "Conclusion" of the Commission is not supported by the evidence or by the alleged findings of fact as made or by the valid findings which were made or by any valid findings which could or should have been made on the record, and is contrary to the evidence in the record and to such valid findings as were made and to the findings of fact which the Commission should have made, and is contrary to the facts and to the law, and is erroneous, illegal and void.

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31. That the Commission erred in rendering a decision in this proceeding, in the making of which decision Commissioner Stephen H. Spingarn participated, for the reason that said Commissioner Spingarn had not heard oral argument in said proceeding, such oral argument having been heard prior to said Commissioner Spingarn's appointment to the Commission; and that the Commission has therefore denied these petitioners the due process of the law; has violated the provisions of the Administrative Procedure Act and has rendered a decision which, in consequence, is illegal and void.

32. That with the exception of those portions dismissing the allegations of Count II of the amended complaint and those portions dismissing the amended complaint entirely as to certain respondents named therein, the Commission's Order to Cease and Desist in this proceeding is, in its entirety and in each and every paragraph, part and provision thereof, not supported by the evidence or by the findings of fact as made or by the valid findings of fact as made or by any valid findings that could and should be made on the record, and is contrary to the evi-

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dence in the record and to the valid findings as made by the Commission and to those findings of fact which the Commission should have made, and is contrary to any valid conclusion that could be made by the Commission, and is contrary to the "Conclusion" as actually made by the Commission, and is fatally vague, indefinite and uncertain, and exceeds the power, authority and jurisdiction of the Commission, and is erroneous, illegal and void.

33. That, in connection with the paragraph of said Cease and Desist Order which prohibits each individual manufacturing respondent named in said Order, without regard to conspiracy or the lack of it, from independently using any of the delivered pricing methods theretofore used in the industry for the purpose or with the effect of "systematically matching the delivered price quotations or the delivered prices of other sellers of chain or chain products", the Commission erred in refusing to make findings of fact (although requested to do so) as to material and relevant facts concerning the economic effects and results, including but not limited to the effect upon the public interest, of requiring each manufacturer of chain to sell exclusively on an f.o.b. plant pricing basis and denying such manufacturer the right, at will and regularly, systematically or otherwise, to meet the delivered prices of competitors located in other places, all of which facts were established by competent, relevant, material and uncontradicted evidence in the record. 62 63

V.

Each of the petitioners also makes severally the prayer made in Article III hereof, and contends that the Commission's said Findings as to the Facts, Conclusion, and Order to Cease and Desist are, as to such petitioner severally,

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erroneous in fact and law in the respects set forth in Article IV hereof.

WHEREFORE, the said petitioners respectfully pray this Honorable Court for the relief hereinbefore set forth.

Respectfully submitted,

SUMNER S. KITTELLE,
420 Lexington Avenue,
New York 17, N. Y.,

65

FRAZER F. HILDER,
1044 Shoreham Building,
15th & H Streets, N. W.,
Washington 5, D. C.,
Attorneys for Petitioners.

(Filed April 20, 1953.)

Joint and Several Supplemental Petition to Review Order of Federal Trade Commission.

To the Honorable Judges of the United States Court of Appeals for the Eighth Circuit:

66

Now come your petitioners, The John M. Russell Manufacturing Company, Inc., a corporation, and Turner & Seymour Manufacturing Company, a corporation, by their attorney, and jointly and severally present this their Joint and Several Supplemental Petition to Review a certain Order of the Respondent Federal Trade Commission (hereinafter sometimes referred to as the "Commission"), made and entered on the 16th day of February, 1953, in a certain

proceeding before said Commission entitled "In the Matter of Chain Institute, Inc., an unincorporated trade association, its directors, officers, and members, et al., Docket No. 4878", and in support thereof respectfully show:

This Joint and Several Supplemental Petition to Review is supplemental to a Joint and Several Petition to Review Order of Federal Trade Commission to which the herein petitioners (with others who were respondents in the said proceeding before the Commission) are parties, filed in this Court contemporaneously with the filing of this Supplemental Petition. It is the sole purpose of this Supplemental Petition to set forth certain Points upon which the herein petitioners intend to rely in addition to the Points set forth in said Joint and Several Petition to Review upon which all petitioners therein (including the herein petitioners) intend to rely.

The herein petitioners, therefore, hereby confirm and reaffirm all of the allegations, prayers, points, matters and things set forth in said Joint and Several Petition to Review Order of Federal Trade Commission and, in addition thereto, state that they intend to rely upon the following additional Points:

1. That the Commission erred in refusing to make findings of fact (although such findings were requested and were, in fact, recommended to it by its Trial Examiner) as to the following material and relevant facts, which facts were established by competent, relevant, material and uncontradicted evidence, to wit:

(a) The members of the Chain Institute, Inc. are divided into welded, weldless, and tire chain groups and divisions, each group holding meetings separate and apart but usually on the same day following the meetings of the said Institute. In addition thereto, there is a Sash and Kindred

Chain Group recognized as a separate and distinct division, holding its meetings infrequently but usually on the same day the meetings of the said Institute are held; companies which are members of this Group only do not receive notice of meetings of the said Institute or copies of the minutes of its meetings. No meetings of this Group have, however, been held for several years.

(b) For a number of years, sash and kindred chain was manufactured by companies which did not make any other type of chain and the history and sale practices indicate that this is a separate branch of the chain industry.

71

2. That the Commission erred in refusing to make findings of fact (although requested to do so) as to the following material and relevant facts, which facts were established by competent, relevant, material and uncontradicted evidence, to wit:

(a) All sales of cable chain, laminated sprocket chain and universal chain made by Turner & Seymour Manufacturing Company were made f.o.b. Torrington, Connecticut, and the customer paid the transportation charge without equalization or allowance. Said Turner & Seymour Manufacturing Company has no competition in the manufacture and sale of this type of sash and kindred chain.

72

(b) Turner & Seymour Manufacturing Company equalizes freight with Holland, Michigan, on furnace chain, which is a type of sash and kindred chain which is manufactured in Holland, Michigan, by Hart & Cooley Mfg. Co., and is sold in competition with furnace chain manufactured by said Turner & Seymour Manufacturing Company. Hart & Cooley is not a member of the Chain Institute, Inc.

(c) At the meetings of the Chain Institute, Inc., nothing was discussed which had to do with sash and kindred chain.

(d) The types of chain known as "Sash and Kindred Chain" are, in general, lighter chains than the chain referred to in the trade by the designation "Weldless Chain". 73

(e) The Turner & Seymour Manufacturing Company does not exchange price lists with its competitors. It does sell certain of its chain items to some of the respondents in the proceeding before the Commission who are competitors in other chain items and when it announces price changes these competitors are sent the announcement at the same time as its other customers. It also buys certain chain items from some of said respondents who are its competitors in other chain items and it receives notices of the price changes from such competitors at the same time as do their other customers. 74

(f) The International Chain Company (now named Campbell Chain Company), of which Mr. George Campbell, Sr., was President, does not and never did manufacture sash or kindred chain.

(g) Turner & Seymour Manufacturing Company does not have and never has had "channels of distribution" or any "jobbers sales agreements".

(h) In some instances Turner & Seymour Manufacturing Company published changed discount sheets increasing its prices before American Chain & Cable Company changed its prices. 75

(i) For substantial periods of time the prices charged by Turner & Seymour Manufacturing Company have been substantially different on various sash and kindred chain items from the prices charged by American Chain Company. For example:

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DISCOUNTS*

(1) *Sash chain—bronze*

Turner and Seymour:	45% from 2/25/37 to 7/1/39 50% from 7/1/39 to 10/5/39 40-5% from 10/5/39 to 5/26/41 40% from 5/26/41
American Chain:	50% from 1/3/39 to 7/27/39 40-5% from 7/27/39 to 6/9/41 40% from 6/9/41

(2) *Sash chain—steel*

Turner and Seymour:	50% from 1/20/36 to 2/25/37 45% from 2/25/37 to 7/1/39 50% from 7/1/39 to 5/26/51 45% from 5/26/41
American Chain:	50% from 2/17/37 to 6/9/41 45% from 6/9/41

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(3) #8 Sash chain—Prices, when quoted, differ at various times. This was such a highly competitive item that for long periods it was quoted as "Prices—on application" by both companies.

(j) The John M. Russell Manufacturing Company, Inc. has, in general, followed the prices quoted by the American Chain & Cable Company on similar items although its increases have always lagged behind those of American and its prices have at times been lower.

78 (k) The John M. Russell Manufacturing Company, Inc. manufactures only five types of sash and kindred chain; has one salesman, and has only twenty employees who devote but a portion of their time to the manufacture of chain.

(l) During the entire period covered by these proceedings, The John M. Russell Manufacturing Company, Inc.

(* All figures from Comm. Exhibits 810-819 and 1043 A-B, 1050, 1056-8, 1063-70, 1073, 1042 Z, 1042 Z-1).

put out only one price list and only four discount sheets—one in 1936, one in 1937, one in 1939, and one in 1941.

(m) The John M. Russell Manufacturing Company, Inc. buys Universal Chain from Turner & Seymour Manufacturing Company, buys "Lock Link" chain from American Chain & Cable Company, buys sprocket chain from The Bridgeport Chain & Manufacturing Company and buys double jack chain in the sizes which it does not manufacture from the Hodell Chain Company in order to fill orders of its customers. Accordingly, it receives announcements of price changes from these companies.

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(n) The John M. Russell Manufacturing Company, Inc. does not exchange price lists with its competitors, although it does send notices of its price changes to those competitors to whom it sells chain items. Such notices are sent only at the same time that announcement is made to the trade generally.

(o) The John M. Russell Manufacturing Company, Inc. does not have any "channels of distribution" and has no jobbers sales agreements.

Wherefore, the herein petitioners, The John M. Russell Manufacturing Company, Inc. and Turner & Seymour Manufacturing Company respectfully pray this Honorable Court for the relief prayed in the said Joint and Several Petition to Review Order of Federal Trade Commission 81 filed contemporaneously herewith.

Respectfully submitted,

Norman King Parsells,
First National Bank Building,
Bridgeport, Connecticut,
Attorney for the Above-Named Petitioners.

(Filed April 20, 1953.)

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Motion for Leave to Withdraw Certain Points Relied Upon, and Certain Portions of the Prayer, in Petitioners' Joint and Several Petition to Review Order of Federal Trade Commission.

To the Honorable Chief Judge and Circuit Judges of the United States Court of Appeals for the Eighth Circuit:

Come now Chain Institute, Inc., American Chain & Cable Company, Inc., The Bridgeport Chain & Manufacturing Company, The McKay Company, Hodell Chain Company, St. Pierre Chain Corporation, S. G. Taylor Chain Company, Cleveland Chain & Manufacturing Company, Campbell Chain Company, Nixdorff-Krein Manufacturing Company, Peerless Chain Company, Round California Chain Company, Seattle Chain & Mfg. Company, Western Chain Products Company, Woodhouse Chain Works, Dennis A. Merriman, William D. Kirkpatrick, and George J. Campbell, Jr., petitioners herein, by their attorneys, and upon the Joint and Several Petition to Review Order of Federal Trade Commission filed herein on or about April 20, 1953, and upon all the proceedings heretofore had herein before this Court, and pursuant to Rule 18 of the Rules of this Court,

83

Respectfully move this Court for leave to withdraw from the Points Upon Which the Petitioners Intend to Rely (under Part IV of said Joint and Several Petition to Review) the following:

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A. All contentions set forth in the first (unnumbered) paragraph under Part IV (on pages 9 and 10) of said Joint and Several Petition to Review except as such contentions relate (i) to Findings as to the Facts dealing with the delivered pricing methods used in the chain industry and (ii) to Findings (if any) as to the Facts bearing upon the appropriateness of the provisions in the cease and desist order dealing with said delivered pricing

Motion for Leave to Withdraw Certain Points Relied Upon, and Certain Portions of the Prayer, in Petitioners' Joint and Several Petition to Review Order of Federal Trade Commission.

85

methods, and except with respect to the Commission's Conclusion as it relates or may relate to said delivered pricing methods, and except with respect to subparagraph (6) of the first (unnumbered) ordering paragraph and all of the third (unnumbered) ordering paragraph of the Order to Cease and Desist.

B. All of Point "1" under said Part IV (on page 10) of said Joint and Several Petition to Review except as said Point "1" applies to the third (unnumbered) ordering paragraph of said Order to Cease and Desist.

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C. All of Point "2" under said Part IV (on pages 10 and 11) of said Joint and Several Petition to Review except as said Point "2" applies to any of the delivered pricing methods used in the chain industry.

D. All of Point "3" under said Part IV (on page 11) of said Joint and Several Petition to Review.

E. All of Points "7" to "15", both inclusive, under said Part IV (on pages 12-14) of said Joint and Several Petition to Review.

F. All of Points "18" and "19", under said Part IV (on pages 15-16) of said Joint and Several Petition to Review.

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G. All of Point "22" under said Part IV (on page 17) of said Joint and Several Petition to Review.

H. All of Point "24" under said Point IV (on page 17) of said Joint and Several Petition to Review except in so

88 *Motion for Leave to Withdraw Certain Points Relied Upon, and Certain Portions of the Prayer, in Petitioners' Joint and Several Petition to Review Order of Federal Trade Commission.*

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far as said Point "24" applies or may apply to any of the delivered pricing methods used in the chain industry.

I. All of Points "25" to "28", both inclusive, under said Part IV (on pages 17-19) of said Joint and Several Petition to Review.

J. All of Point "29" under said Part IV (on page 19) of said Joint and Several Petition to Review except in so far as said Point "29" relates or may relate to any of the
89 delivered pricing methods used in the chain industry.

K. All of Point "30" under said Part IV (on page 19) of said Joint and Several Petition to Review except in so far as said Point "30" relates or may relate to any of the delivered pricing methods used in the chain industry.

L. All of Point "31" under said Part IV (on page 20) of said Joint and Several Petition to Review.

M. All of Point "32" under said Part IV (on page 20) of said Joint and Several Petition to Review except in so far as said Point "32" applies to subparagraph (6) of the first (unnumbered) ordering paragraph and to all of the third (unnumbered) ordering paragraph of the Order to
90 Cease and Desist.

AND SAID PETITIONERS FURTHER RESPECTFULLY MOVE this Court for leave to withdraw from paragraph "2" of their Prayer (under Part III of said Joint and Several Petition to Review) all except the Prayer that this Court review the proceeding before the Federal Trade Commission and the Commission's Order to Cease and Desist herein and

Motion for Leave to Withdraw Certain Points Relied Upon, and Certain Portions of the Prayer, in Petitioners' Joint and Several Petition to Review Order of Federal Trade Commission.

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enter an order modifying the Commission's Findings as to the Facts, Conclusion and Order to Cease and Desist relating to the delivered pricing methods used in the chain industry by eliminating therefrom such findings, provisions and terms as are not supported by the evidence or by the law.

[A copy of Parts III and IV of said Joint and Several Petition to Review as the same would appear after giving effect to the withdrawals hereinbefore described is annexed hereto as Exhibit "A" which is hereby made a part of this motion.]

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And said Petitioners further respectfully move this Court for such other and further relief as to this Court may seem just in the premises.

As grounds for the foregoing motion, said Petitioners respectfully show this Court and allege:

1. That they are anxious to bring this matter to a conclusion at the earliest practicable date and at the least expense, and to that end have filed a separate Motion for Remand of this proceeding to the Federal Trade Commission.

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2. That counsel for the Federal Trade Commission, in their brief in opposition to said motion for remand, have questioned whether such remand would in fact save time or expense if Petitioners reserved their right to ask this Court to review the entire Findings, Conclusions and Order of the Commission on their merits.

94 *Motion for Leave to Withdraw Certain Points Relied Upon, and Certain Portions of the Prayer, in Petitioners' Joint and Several Petition to Review Order of Federal Trade Commission.*

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3. That Petitioners, despite their sincere belief that such a full-scale review of the entire case on the merits would result in the Commission's entire Findings, Conclusion and Order being set aside and the complaint against Petitioners dismissed, are desirous of saving time and expense and of expediting this proceeding, and are therefore willing to abandon all of their Points of Review except those set forth in Exhibit "A" annexed to this motion.

95 4. That the effect of such abandonment and withdrawals of all Points except those set forth in said Exhibit "A" will be to narrow the issues on review by this Court, in so far as these moving Petitioners are concerned, to those which will be argued before the Federal Trade Commission if Petitioners' said motion for remand is granted. If, therefore, the Commission grants, upon remand, the substance of the relief which Petitioners seek, the necessity for any review at all by the Court as to these Petitioners will be obviated.

Dated: June 15, 1954.

Respectfully submitted,

96 SUMNER S. KITTELLE,
420 Lexington Avenue,
New York 17, N. Y.,

FRAZER F. HILDER,
1044 Shoreham Building,
Washington 5, D. C.,
Attorneys for Petitioners.

Filed June 17, 1954.

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Exhibit "A".

Text of Parts III and IV of Petitioners' Joint and Several Petition to Review Order of Federal Trade Commission after Giving Effect to the Withdrawals of Points and Prayers Described in the Annexed Motion for Leave to Withdraw.

III.

The Relief Prayed.

Petitioners respectfully pray this Court for the following relief.

1. That a copy of this petition be forthwith served by the Clerk of this Court upon the respondent Federal Trade Commission in the manner set forth in Rule 27 (a) of the Rules of this Court, and that said Commission be required forthwith, in conformity with Section 5 (c) of the Federal Trade Commission Act, to certify and file in this Court a transcript of the entire record in the proceeding before it entitled, as aforesaid, "In the Matter of Chain Institute, Inc., an incorporated trade association, its directors, officers, and members, et al., Docket No. 4878", including all the evidence taken and the report and order of the Commission. 98

2. That this Court review the said proceeding and the Commission's said Order to Cease and Desist and enter an order modifying the Commission's said Findings as to the Facts and Conclusion and said Order to Cease and Desist relating to the delivered pricing methods used in the chain industry by eliminating therefrom such findings, provisions and terms as are not supported by the evidence or by the law. 99

3. And that this Court grant these petitioners such other and further relief as to this Court may seem just.

100 *Exhibit "A".*

IV.

THE POINTS UPON WHICH THE PETITIONERS INTEND TO RELY.

The petitioners contend that the Commission's said Findings as to the Facts dealing with the delivered pricing methods used in the chain industry, and its said Findings (if any) as to the Facts bearing upon the appropriateness of the provisions in its cease and desist order dealing with said delivered pricing methods, are, in many respects, not supported by the evidence, or are incomplete or misleading in the absence of additional material facts which
101 are established by substantial and uncontradicted evidence but not found by the Commission; that the Commission's said Conclusion in so far as it relates or may relate to said delivered pricing methods is erroneous as a matter of fact and as a matter of law; that subparagraph (6) of the first (unnumbered) ordering paragraph, and all of the third (unnumbered) ordering paragraph of the Commission's said Order to Cease and Desist are erroneous and illegal in that they are not supported by validly-made findings of fact and in many respects go beyond the matters alleged in the complaint and amended complaint and exceed the power, authority and jurisdiction of the Commission and are in many respects so vague, indefinite and uncertain that petitioners cannot, with legal safety, conduct their business in an entirely lawful manner under them. More
102 specifically, but without limitation, petitioners contend:

1. That the alleged finding or conclusion of the Commission to the effect that "this proceeding is in the interest of the public" is erroneous in so far as it applies to the said third (unnumbered) ordering paragraph of the said Order to Cease and Desist which, in substance, prohibits the corporate respondents individually and regardless of any conspiracy, combination, understanding, agreement or planned common cause of action, from using any of the

delivered pricing methods described in said paragraph "for the purpose or with the effect of systematically matching the delivered-price quotations or the delivered prices of other sellers of chain or chain products".

2. That the Commission's alleged findings of fact to the effect that the Chain Institute, Inc. and certain individuals who were respondents before the Commission, or any of them, participated in any alleged conspiracy with respect to any of the delivered pricing methods in the industry are not supported by the evidence, are contrary to the evidence in the record, and are erroneous, illegal and void.

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4. That the Commission erred in refusing to make findings (although requested to do so) as to material and relevant facts concerning the lawful and non-collusive origin, history and development throughout the years since the early 1900's, of the respective delivered pricing methods presently used in the sale of the various types of chain and chain products, which facts were established by competent, relevant, material and uncontradicted evidence in the record.

5. That the Commission erred in refusing to make findings (although requested to do so) of material and relevant facts concerning said delivered pricing methods, to wit, that there has been no conspiracy, agreement, collusion, or planned common course of action in either the adoption or continued use of any of said methods of selling; that the chain manufacturers never even discussed any of these methods among themselves; and that each chain manufacturer adopted and used the method or methods presently used by it as a matter of independent business judgment; all of which facts are established by competent, relevant, material and uncontradicted evidence in the record. 105

106 *Exhibit "A".*

6. That the Commission's alleged finding of fact to the effect that the delivered price method of selling tire chains is sometimes referred to as the "zone delivered-price method or system" is not supported by the evidence, is contrary to the evidence in the record, and is erroneous, illegal and void.

* * * * * * *

16. That the Commission's alleged findings of fact to the effect that the purpose of the freight rate books compiled by Charles Donley was to provide the sellers of welded chain with common delivery charge factors to be included in the price of welded chain, and that it was more
107 important that all sellers use the same factor than the correct freight rate, and that the chain manufacturers, who were respondents in the proceeding before the Commission considered it more important that all sellers use the same delivery charge factor, are not supported by the evidence, are contrary to the evidence in the record, and are erroneous, illegal and void.

17. That the Commission erred in refusing to make findings (although requested to do so) as to material and relevant facts concerning the history of the so-called Donley freight book, the accuracy of the rates set forth therein, the extent to which said book was used, or not used, by the various chain manufacturers, the use by some of said
108 manufacturers of other freight rate services, and the lack of any agreement or understanding among the chain manufacturers that they would use the said Donley book, all of which facts are established by competent, relevant, material and uncontradicted evidence in the record.

* * * * * * *

20. That the Commission's alleged finding of fact to the effect that the respondents in the proceeding before the Commission have been able to achieve an allegedly rela-

tively high degree of price identity in quoting and selling various types of chain is not supported by the evidence, is contrary to the evidence in the record, and is erroneous, illegal and void.

21. That the Commission erred in refusing to make findings (although requested to do so) as to material and relevant facts concerning the degree of price non-uniformity in the chain industry, to wit, that during a time when economic conditions were bordering on the inflationary 20% of the sales of chain manufacturers were at off-list, non-uniform prices, and that during the depressed business periods of 1932, early 1933, 1936 and 1938, such percentage 110
of off-list, non-uniform prices was considerably higher than 20%, which facts are all established by competent, relevant, material and uncontradicted evidence in the record.

* * * * * *

23. That the Commission's alleged finding of fact to the effect that there was a relatively high degree of uniformity in the bids submitted to the Navy Department on welded and weldless chains is not supported by the evidence, is contrary to the evidence in the record, and is erroneous, illegal and void.

24. That the Commission's alleged finding of fact to the effect that prices are allegedly "determined" by alleged 111
"pricing methods" allegedly used by the respondents in the proceeding before the Commission is not supported by the evidence; is contrary to the evidence in the record, and is erroneous, illegal and void, in so far as said alleged finding applies or may apply to any of the delivered pricing methods used in the chain industry.

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112 *Exhibit "A".*

29. That each and all of the Commission's alleged findings of facts (including but not limited to conclusions of the Commission) contained in the second sentence of the first (unnumbered) paragraph and all of the second (unnumbered) paragraph of "Paragraph Nine" and in "Paragraph Ten" (in so far as said "Paragraph Ten" relates or may relate to any of the delivered pricing methods used in the chain industry) of the Commission's said "Findings as to the Facts and Conclusion", are not supported by the evidence or by the valid findings of fact made by the Commission, are contrary to the evidence in the record and to such valid findings and to the findings of fact which the
113 Commission should have made, and are erroneous, illegal and void.

30. That the alleged "Conclusion" of the Commission (in so far as it relates or may relate to any of said delivered pricing methods) is not supported by the evidence or by the alleged findings of fact as made or by the valid findings which were made or by any valid findings which could or should have been made on the record, and is contrary to the evidence in the record and to such valid findings as were made and to the findings of fact which the Commission should have made, and is contrary to the facts and to the law, and is erroneous, illegal and void.

* * * * * *

114 32. That subparagraph (6) of the first (unnumbered) ordering paragraph, and all of the third (unnumbered) ordering paragraph, of the Commission's Order to Cease and Desist in this proceeding are in their entirety and in each and every paragraph, part and provision thereof, not supported by the evidence or by the findings of fact as made or by the valid findings of fact as made or by any valid findings that could and should be made on the record, and are contrary to the evidence in the record and to the

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valid findings as made by the Commission and to those findings of fact which the Commission should have made, and are contrary to any valid conclusion that could be made by the Commission, and are contrary to the "Conclusion" as actually made by the Commission, and are fatally vague, indefinite and uncertain, and exceed the power, authority and jurisdiction of the Commission, and are erroneous, illegal and void.

33. That, in connection with the paragraph of said Cease and Desist Order which prohibits each individual manufacturing respondent named in the Order, without regard to conspiracy or the lack of it, from independently using any of the delivered pricing methods theretofore used in the industry for the purpose or with the effect of "systematically matching the delivered price quotations or the delivered prices of other sellers of chain or chain products", the Commission erred in refusing to make findings of fact (although requested to do so) as to material and relevant facts concerning the economic effects and results, including but not limited to the effect upon the public interest, of requiring each manufacturer of chain to sell exclusively on an f.o.b. plant pricing basis and denying such manufacturer the right, at will and regularly, systematically or otherwise, to meet the delivered prices of competitors located in other places, all of which facts were established by competent, relevant, material and uncontradicted evidence in the record.

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Filed June 17, 1954.

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Pertinent F. T. C. Docket Entries.

Original Complaint issued December 22, 1942.

Order entered December 10, 1943, setting preliminary hearings beginning January 17, 1944 for the sole purpose of establishing a record of the identity, authenticity and genuineness of documents.

Hearings held for above-stated purpose, January 17 and 18, 1944.

Amended Complaint issued October 9, 1945.

Answers filed on or before November 28, 1945.

119 Amended Answer of The John M. Russell Manufacturing Company filed November 27, 1945.

Amended Answer of American Chain & Cable Company, Inc. and William D. Kirkpatrick filed December 29, 1945.

Hearings held April 4 & 25, 1946; May 15, 1946; June 18, 1946; July 15, 1946; August 6, 1946; September 9, 1946; October 22, 1946; January 21, 1947; February 10, 1947; April 2, 1947; May 6 & 27, 1947; June 10 & 23, 1947; September 30, 1947; October 1, 2 & 3, 1947; November 5, 6 & 7, 1947; December 9 & 10, 1947; January 12 & 26, 1948; February 9, 1948; March 2, 1948; June 9 and 10, 1948; July 7, 1948.

Case closed by Trial Examiner, August 25, 1948.

120 Trial Examiner's Recommended Decision filed, September 23, 1948.

Amendment to Trial Examiner's Recommended Decision filed, October 1, 1948.

Notice of Corrections to Trial Examiner's Recommended Decision filed, October 6, 1948.

Oral Argument before Commissi[illegible]pril 7, 1949.

Reargument before Commission, September 22, 1950.

Order Disposing of Exceptions, Etc. and Findings as to the Facts, Conclusion and Cease and Desist Order, entered February 16, 1953.

Order entered December 28, 1953 denying motions for rehearing; striking Frank A. Bond (deceased) from the cease and desist order; and dismissing the complaint as to Frank A. Bond.

Amended Complaint. 122

BEFORE FEDERAL TRADE COMMISSION

Docket No. 4878

IN THE MATTER OF CHAIN INSTITUTE, INC., et al.

This complaint is filed to obtain relief from respondents' activities because of their violations, jointly and severally, as hereinafter alleged in Count I herein, of Section 5 of an Act of Congress entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," commonly referred to as the Federal Trade Commission Act, as approved September 26, 1914, and amended March 21, 1938 (38 Stat. 717; 15 U. S. C. A. 123 sec. 41; 52 Stat. 111), and because of their violations, as alleged in Count II herein, of Section 2 (a) of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," commonly referred to as the "Clayton Act," as approved October 15, 1914, and amended June 19, 1936 (38 Stat. 730; 15 U. S. C. A. sec. 12, 49 Stat. 1526; 15 U. S. C. A. sec. 13, as amended).

124 *Amended Complaint.*

COUNT I

The Charge Under the Federal Trade Commission Act.

Paragraph One: Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the parties named in the caption hereof, and more particularly described and referred to hereinafter as respondents, have violated the provisions of Section 5 of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its amended
125 complaint, stating its charges in that respect as follows:

Nature of Charges

Paragraph Two: The charges as hereinafter set forth are to the effect that the respondents have combined and conspired to restrain trade and commerce in the sale of chain and chain parts among the several States of the United States, that they have been and are making effective such combination and conspiracy through cooperative and collective action between and among themselves and with others, and that each respondent engaged in the manufacture and sale of chain uses methods and practices to make
126 the combination and conspiracy more effective.

Description of Respondents

Paragraph Three: (1) Respondent Chain Institute, Inc., a trade association (sometimes hereinafter referred to as Institute), is a corporation organized and existing under the laws of the State of Delaware, with its principal office at 208 S. LaSalle Street, Chicago, Illinois.

(2) Respondent American Chain & Cable Company, Inc. (sometimes hereinafter referred to as American) is a corporation organized and existing under the laws of the State of New York, with its principal office at Bridgeport, Connecticut. Its general office is at 230 Park Avenue, New York, N. Y., and with a plant and office located at East Princess and Charles Streets, York, Pennsylvania.

(3) The respondent Bridgeport Chain & Manufacturing Company (sometimes hereinafter referred to as Bridgeport) is a Connecticut corporation with its principal office at 964 Crescent Avenue, Bridgeport, Connecticut.

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(4) Respondent The McKay Company (sometimes hereinafter referred to as McKay) is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal offices located at McKay Building, Pittsburgh, Pennsylvania.

(5) Respondent Pyrene Manufacturing Company (sometimes hereinafter referred to as Pyrene) is a corporation organized and existing under the laws of the State of Delaware, with its principal office located at 360 Blmnt. Avenue, Newark, New Jersey.

(6) Respondent Hodell Chain Company (sometimes hereinafter referred to as Hodell) is a corporation organized and existing under the laws of the State of Ohio, with 129
principal office located at 3924 Cooper, Cleveland, Ohio. Said respondent was organized in 1893 and until recently traded under the name and title Chain Products Company.

(7) Respondent St. Pierre Chain Corporation (sometimes hereinafter referred to as St. Pierre) is a corporation organized and existing under the laws of the State of Massachusetts, with its principal office located in Worcester, Massachusetts.

(8) Respondent S. G. Taylor Chain Company (sometimes hereinafter referred to as Taylor) is a corporation organized and existing under the laws of the State of Illinois, with principal office located at 3 141st Street, Hammond, Indiana.

(9) Respondent Cleveland Chain & Manufacturing Company (sometimes hereinafter referred to as Cleveland) is a corporation organized and existing under the laws of the State of Ohio with principal office located at Broadway and Henry Streets, Garfield Heights, Cleveland, Ohio.

131 (10) The respondent Columbus McKinnon Chain Corporation (sometimes hereinafter referred to as Columbus) is a corporation organized and existing under the laws of the State of New York, with principal office located at Tonawanda, New York.

(11) Respondent International Chain & Manufacturing Company (sometimes hereinafter referred to as International) is a corporation organized and existing under the laws of the State of Pennsylvania, with principal office located at Norway and Elm, York, Pennsylvania.

(12) Respondent Nixdorff-Krein Manufacturing Company (sometimes hereinafter referred to as Nixdorff) is a corporation organized and existing under the laws of the
132 State of Delaware, with principal office located at 900 Howard Street, St. Louis, Missouri.

(13) Respondent Peerless Chain Company (sometimes hereinafter referred to as Peerless) is a corporation organized and existing under the laws of the State of Minnesota, with its principal office located at Winona, Minnesota.

(14) Respondent Round California Chain Company (sometimes hereinafter referred to as Round) is a corpo-

ration organized and existing under the laws of the State of California, with its principal office located on Bay Shore Highway, South San Francisco, California.

(15) Respondent J. M. Russell Manufacturing Company (sometimes hereinafter referred to as Russell) is a corporation organized and existing under the laws of the State of Connecticut with its principal office located at Naugatuck, Connecticut.

(16) Respondent Seattle Chain & Mfg. Company (sometimes hereinafter referred to as Seattle) is a corporation organized and existing under the laws of the State of 134
Washington, with principal office at 6921 East Marginal Way, Seattle, Washington.

(17) Respondent Turner & Seymour Manufacturing Company (sometimes hereinafter referred to as Turner) is a corporation organized and existing under the laws of the State of Connecticut with principal office at Torrington, Connecticut.

(18) Respondent Western Chain Products Company (sometimes hereinafter referred to as Western) is a corporation organized and existing under the laws of the State of Illinois, with its principal office located at 1807 West Belmont Avenue, Chicago, Illinois.

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(19) Respondent Woodhouse Chain Works (sometimes hereinafter referred to as Woodhouse) is a corporation organized and existing under the laws of the State of New Jersey, with principal office at 251 Third Street, Trenton, New Jersey.

(20) Respondent Dennis A. Merriman, an individual (sometimes hereinafter referred to as Merriman), is Man-

aging Director of Respondent Institute with office located at 208 South LaSalle Street, Chicago, Illinois.

(21) Respondent Walter S. McCann, an individual (sometimes hereinafter referred to as McCann), is Secretary and Treasurer of Respondent Institute with office located at 208 South LaSalle Street, Chicago, Illinois.

(22) Respondent Wm. D. Kirkpatrick, an individual (sometimes hereinafter referred to as Kirkpatrick), is Vice President of respondent American and President of Respondent Institute, with office located at the office of
137 respondent American, York, Pennsylvania.

(23) Respondent Frank A. Bond, an individual (sometimes hereinafter referred to as Bond), is Executive Vice President and Secretary of respondent McKay and an official of Respondent Institute in dealing with freight rate matters, with office located at McKay Building, Pittsburgh, Pennsylvania.

(24) Respondent George J. Campbell, Jr., an individual (sometimes hereinafter referred to as Campbell) is President of respondent International and Vice President of Respondent Institute with offices located at the principal place of business of respondent International in York, Pennsylvania.

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(25) Respondent Alfred Pefer Shirley (sometimes hereinafter referred to as Shirley) is an individual, a resident of Mt. Vernon, Virginia, who is engaged as a Government contract broker and is a partner in the firm of Shirley, Olcott & Nichols, which maintains its offices in the Mills Building, Washington, D. C.

(26) Respondent Floyd B. Olcott (sometimes hereinafter referred to as Olcott) is an individual who resides at 7828 Orchid Street, N. W., Washington, D. C., who is engaged as a Government contract broker and is a partner in the firm of Shirley, Olcott & Nichols, which maintains its offices in the Mills Building, Washington, D. C.

(27) Respondent Forrest C. Nichols (sometimes hereinafter referred to as Nichols) is an individual who resides at 4702 Quebec Place, Washington, D. C., who is engaged as a Government contract broker and is a partner in the firm of Shirley, Olcott & Nichols, which maintains its offices in the Mills Building, Washington, D. C. 140

Each of the respondents described in this Paragraph, subparagraphs (2) to (19), inclusive, sometimes hereinafter referred to as Respondent Members, is a member of Respondent Institute, named and described in subparagraph (1) of this Paragraph, and has for a number of years, through such membership and otherwise, directly participated in the cooperative and collective action of all of those named herein as respondents in the formation, putting into operation and making effective the methods, systems, practices and policies which are alleged herein to be unlawful.

Each of the individual respondents who are described in this Paragraph, subparagraphs (20) to (27), inclusive, has, for a number of years, participated in the cooperative 141 and collective action of all of those named herein as respondents in the formation, putting into operation and making effective the methods, systems, practices and policies which are alleged herein to be unlawful.

DESCRIPTION OF THE INDUSTRY AND BUSINESS OF RESPONDENTS

PARAGRAPH FOUR: The products with which this proceeding is concerned are various types of steel, alloy-steel and other metallic chain and chain parts. The principal types of chain involved here are Welded Chain, Weldless Chain and Tire Chain.

Welded Chain is so designated because each link is closed and sealed through welding. It includes chain of various size and weights for many uses such as Anchor Chains, Log Chains, Tie Chains (for securing dairy cows at stanchions), Tie-Out Chains (for use in securing cows and other ani-
143 mals for grazing, etc.) and Trace Chains (for harnessing teams and for other agricultural uses).

Since the development of the art of electric welding, the Welded Chain Industry has used it for mass production of Welded Chain. It is this type or class of chain upon which chain manufacturers depend for their principal tonnage and business. In the trade, Welded Chain is also referred to as Commercial Chain and Pound Chain. It is priced by the manufacturers on a per pound basis.

Weldless Chain is made by bending chain wire into the form of links without the use of the welding process. Such chain is for the most part light in weight and in general is used only where the stronger Welded Chain is not required.

144 Tire Chains are made by the welding process but are so linked as to form two line chains connected by cross chains spaced at equal distances so that they may be attached around the wheels of motorized equipment, including automobiles, trucks and farm tractors.

Welded and Weldless Chain as such are not patented articles but the manufacture and sale of Tire Chains was carried on under a patent monopoly of Respondent American until the patents expired in 1921. Since that date prac-

tically all of the chain manufacturers have produced and sold Tire Chains as unpatented goods. However, Respondent American, beginning in 1918, acquired patents on improvements in making Tire Chains. Respondent McKay subsequent to 1925, also acquired patents on improvements in the making of Tire Chains. The most important of the patents thus acquired by Respondents American and McKay in the manufacture of Tire Chains relate to the reinforcement of the tread links in the cross chains by adding to each such link additional metal at the wearing or contact point or surface in the form of a diagonally extending reinforcing anti-skid bar or other device. The relevancy and materiality to this proceeding of respond- 146
ents' practices in their use of patent monopolies over such improvements in Tire Chains are hereinafter set forth at length in Paragraphs Six and Seven of Count I hereof.

Respondent Members in the course and conduct of their business manufacture, sell and distribute practically all the Welded Chain, Weldless Chain and Tire Chains produced in the United States. The said Respondent Members sell such products at various points throughout the United States to wholesalers, dealers and consumers including the United States Government, and when sales are made Respondent Members have regularly shipped and do ship said products to the purchasers at points in the several States of the United States and the District of Columbia other than in the States of origin of the shipments. The 147
term "commerce" as hereinafter used means "commerce" as defined in the Federal Trade Commission Act.

Prior to the adoption of the practices hereinafter described, said Respondent Members were in active and substantial competition with each other and with other members of the Chain Industry in making and seeking to make sales of their products in trade and commerce between and among the several States of the United States and in the

District of Columbia; and except for the use of the acts, methods, practices and policies hereinafter described such active and substantial competition would have continued and said Respondent Members would now be in active and substantial competition with each other and with other members of the industry.

OFFENSES CHARGED

PARAGRAPH FIVE: For more than eight years last past Respondents have maintained and now have in effect an unlawful combination (more fully hereinafter described in
149 detail in the specifications of the purposes, acts and results accomplished pursuant thereto) between and among themselves and others not named herein as respondents to hinder, frustrate, suppress and eliminate competition in the manufacture, sale and distribution of chain and chain products, including Welded Chain, Weldless Chain and Tire Chains, in the course of the aforesaid commerce among and between the various States of the United States and in the District of Columbia.

The general purpose and result of the said combination are accomplished through cooperative and collective action in which respondents have engaged, continued and are now carrying out, in promoting a common course of action, mutual agreement, understanding and conspiracy to em-
150 ploy, and the actual employment of the acts, methods, systems, practices and policies described and set forth in Paragraphs Six, Seven, Eight, Nine, Ten and Eleven hereof and which are aided, abetted, encouraged and made more effective by participation of the respective respondents therein through their separate employment of the acts, methods, systems, practices and policies set forth in Paragraphs Eight, Nine, Ten and Eleven hereof.

Pursuant to, in furtherance of, and as a part of the aforesaid combination, respondents have done and performed the following acts and things, and used the following methods, systems and practices:

(1) Respondent Members, acting among themselves and through and by means of Respondent Institute, its directors, officers and agents, including Respondents Merriman, McCann, Kirkpatrick, and Campbell, Jr., and on certain occasions through and by means of Respondents Shirley, Olcott and Nichols, and by other means and methods have entered into, engaged in and carried out, and are still engaged in and carrying out, understandings and agreements for the purpose and 152
with the effect of substantially hindering, frustrating, suppressing and eliminating actual and potential competition as to price and otherwise in the sale and distribution of welded chain, weldless chain and tire chain in trade and commerce between and among the various States of the United States and in the District of Columbia.

(2) Respondent Members organized, have operated, and do now operate Respondent Institute as an incorporated trade association to promote and serve the mutual interests of the Respondent Members, and now use it as an instrument or vehicle for their joint and cooperative purpose and action in hindering, frustrating, suppressing and eliminating competition in price 153
and otherwise in the sale and distribution of chain and chain products in commerce among and between the various States and in the District of Columbia.

(3) Respondent Members employed Respondent Merriman on or about August 1, 1938, to serve them as a common agent to make more effective their suppression of price competition, and he has since that

date served them as a common agent in the suppression of price competition and "stabilization of prices in the industry."

When Respondent Members were considering their employment of Respondent Merriman during July, 1938, one of their representatives, an official of Respondent International, who was charged with the task of interviewing said Merriman wrote one of his confederates:

"This is unusually confidential, and I wish you would keep it to yourselves, that we are figuring around for a new man to run the industry, something like a Judge 155 Landis, or a moving picture boss, or something like that, that can hold the 'brothers' more in line than they have been in the past; * * * so that I think that things are moving in the right direction for the stabilization of prices in the industry. * * *"

(4) Respondent Members agreed to fix and maintain, and have fixed, maintained and made effective identical delivered price quotations, terms and conditions of sale for chain and chain products in the United States to dealers and distributors thereof and to other purchasers thereof, including the Procurement Division of the U. S. Treasury Department and other governmental agencies.

156 (5) Respondent Members have adopted and continued in effect by agreement, understanding, and concerted action among themselves, price fixing formulae whereby identical delivered price quotations and identical delivered costs for the sale of chain and chain products are fixed and maintained.

(6) Respondent Members agreed to adopt and have adopted and maintained systems of delivered price quotations and delivered costs designed to prevent and

which do prevent reflection in such quotations and costs any of the differences in cost of raw materials, other items, or freight delivery from their respective places of manufacture to the places of business of the intending purchasers of chain and chain products. Said systems also prevent the creation of any advantage to many of said purchasers in delivered cost which would otherwise result because of proximity of such purchasers to the places of production and on the contrary result in discrimination against nearby customers.

(7) Respondent Members cooperatively and collectively make and announce price quotations in such a way that the delivered cost of their respective products 158
to a purchaser is matched and made identically the same by all members regardless of which one of them may supply any purchaser or user and regardless from which of their producing plants the goods are purchased and shipped. Such results are obtained by said Respondent Members through the separate employment and use by each of pricing methods which for convenience here are referred to as basing point system or practice, freight equalization system or practice and zone system or practice, and more fully and particularly described in Paragraphs Eight, Nine, Ten and Eleven hereof. Through the use of such systems and practices Respondent Members have prevented the principles and forces of competition from making 159
and determining their respective price quotations.

(8) Respondent Members have cooperatively promoted adherence and do now cooperatively promote adherence to delivered prices announced under their so-called basing point system in their sale of welded chain, as aforesaid, and make such prices effective. They further obviate and preclude the exercise of in-

dependent and competitive will, judgment and action with regard to prices and price policies under said system by:

(a) providing themselves with a schedule or compilation of common pricing factors which respondents designate as "freight rate" factors and which they cause to be jointly prepared for them directly and through Respondent Institute by one Charles Donley, Pittsburgh, Pennsylvania, and others. Such schedule or compilation is for use by each of said Respondent Members in calculating and determining the freight factor in the delivered price quotations
161 on Welded Chain as made by each to its respective customers. The compilation of "freight rate" factors thus cooperatively and collectively compiled and disseminated between and among Respondent Members is not intended to serve any need for freight rates for shipping purposes but is designed for their use in pricing as aforesaid and is so used. These freight factors are not the actual or official freight rates in many if not most instances but are used in each instance, regardless of routes and rates, between the points indicated in the compilation. They do not comprise an accurate or approximate showing of the actual freight rates applicable from the various points from which Respondent Members actu-
162 ally ship chain and chain products;

(b) filing and exchanging the intimate details of each other's business directly or indirectly with one another through the offices of Respondent Institute and otherwise. Information thus filed and exchanged between and among said respondents has included such intimate details of each other's business as the names of certain of their respective customers, the

prices paid to each member by such customers, and the volume of business placed in particular instances with each Respondent Member by such customers;

(9) Respondent Members, by agreement, have adopted and used a price leadership plan whereby Respondent American leads in the announcement and publication of price increases and decreases and as a part of the price leadership "plan," as agreed upon, such announcements and publications of Respondent American are adopted and followed by the other Respondent Members. 163

(10) Respondent Members have communicated between and among themselves and filed and exchanged with each other through correspondence, telegraph, telephone and otherwise, information concerning prices which have been quoted and charged by particular Respondent Members and information concerning future prices and price quotations to be charged by Respondent Members for chain and chain products. 164

(11) Respondent Members agreed to hold and have held meetings from time to time under the auspices and supervision of Respondent Institute, its officers, employees and agents, including Respondent Merriman, during the course of which and at other times Respondent Institute and its officers and other agents cooperated with and assisted said Respondent Members in furthering and carrying out the unlawful acts, practices and methods herein set forth. 165

(12) Respondent Merriman and other officials and agents of Respondent Institute have, from time to time during the course of meetings of members of Respondent Institute and at other times, communicated and discussed past, current and future prices and price quotations with various Respondent Members and ad-

vised, instructed and pressed them with regard to what price quotations should be made on chain and chain products.

(13) Respondent Members, with the assistance of Respondent Merriman, agreed to adopt and have adopted and maintained a uniform method of determining the basic and additional discounts and the amount thereof to be granted by the respective Respondent Members to their respective purchasers of chain and chain products manufactured and sold as aforesaid by said Members.

167 (14) Respondent Members have agreed to increase and decrease and have simultaneously increased and at other times decreased the basic discounts and the amounts thereof at which said Members sell chain and chain products.

(15) Respondent Members agreed to enter into and have entered into written "jobbers sales agreements" and "dealers agreements" pursuant to and under which the jobbers and dealers of the respective Respondent Members were required to maintain in their resale of chain and chain products the resale prices prescribed by said Members.

(16) Respondent Members, acting directly between and among themselves and through and by means of 168 Respondent Institute, its directors, officers and agents, including Respondents Merriman, McCann, Kirkpatrick, and Campbell, Jr., and on some occasions through and by means of Respondents Shirley, Olcott and Nichols, have agreed to adopt and have adopted and maintained a classification of purchasers of chain and chain products, including tire chains, for the purpose of aiding Respondent Members and which has aided Respondent Members in establishing arbitrary

"channels of distribution" through particular types of middlemen and the establishment of arbitrary and particular levels of discounts for each class of customer, so classified in respondents' "channels of distribution."

(17) Respondent Members, with the cooperation and assistance of Respondents Merriman, Shirley, Olcott and Nichols, fraudulently secured from officials of the Procurement Division of the United States Treasury Department approval of certain specifications of tire chains for the purpose and with the effect of aiding respondents in eliminating certain competitors and their price competition in the submission of bids on 170
tire chains to the Federal Government.

(18) Respondent Members, prior to, during 1943 and thereafter, acted to obstruct production and sales of chain by persons and firms not under control of respondents, and thereby interfered with production of chain contracted for use in the war effort.

PARAGRAPH SIX: Respondent American, originally known as Weed Chain Tire Grip Company, was the original manufacturer of tire chains in this country and until about 1921 it enjoyed a patent monopoly in the manufacture and sale of tire chains by virtue of its ownership or control of the following patents: Parsons No. 723,299, March 24, 1903, and Weed No. 768,495, August 23, 1904. Despite the fact 171
that Respondent American was engaged in active litigation from 1904 to 1913 relative to the aforesaid controlling patents on tire chains, it was the dominating factor in the tire chain business. However, in 1921, when the aforesaid patents expired, other chain companies entered upon the manufacture and sale of tire chains but Respondent American remained a dominant factor in the manufacture and sale of tire chains and continued to be recognized and

accepted by its competitors, through mutual understanding, as the price leader in the industry.

Toward the end of the 1920's Respondent American acquired ownership or control over patented inventions covering improvements in tire chains. The improvements are generally described as bar reinforcements and anti-skid devices. Some such improvements are covered by letters patent Beckwith No. 1,536,556, May 5, 1925; Revburn No. 1,696,255, December 25, 1928; and Conner No. 2,180,101, November 14, 1939. Other patents controlled by Respondent American cover several forms of reinforced anti-skid links for tire chains. There are no patents applicable to
173 tire chains as such.

The aforesaid anti-skid reinforced links are made a part of the tread members in the cross chains of tire chains with the reinforcements usually in the form of a diagonally extending bar or other such device on the contact points of the tread member links which are the points subjected to the greatest wear. Although other tire chain manufacturers were engaged in the manufacture and sale of tire chains not embodying the aforesaid patented inventions held by Respondent American, the latter brought at least one such competitor into litigation under allegations that it was infringing its patents. The company which was thus involved in such litigation with Respondent American was Respondent McKay which had been marketing a type
174 of reinforced chain having the trade name "Multi Grip."

Pursuant to, in furtherance of, and to make more effective the unlawful combination described in Paragraph Five hereof, Respondent American and Respondent McKay settled the aforesaid suit by agreement in September, 1935.

Pursuant to, in furtherance of, and to make more effective the unlawful combination described in Paragraph Five hereof, Respondent American and Respondent McKay also

entered into written agreements on September 26, 1935, pursuant to the terms of which Respondent American adopted the subterfuge of a so-called "license" to Respondent McKay to make and sell unpatented tire chains embodying the anti-skid reinforcement features of the aforesaid Beckwith, Reyburn, Conner and other patents held by Respondent American. These agreements also provided for Respondent McKay's purchase of cross chains containing the tread links embodying anti-skid reinforcement features controlled under the aforesaid patents owned by Respondent American. The agreements also stipulated that Respondent McKay in its sale of unpatented tire chains containing the patented cross chains or tread member links embodying the anti-skid reinforcement features 176 under the aforesaid patents, should not sell such tire chains at any price except that specified by Respondent American. The agreements also provided for payment of a royalty by the so-called "licensee" to be used and expended for the benefit not only of the so-called "licensor" but also of the "licensee" through advertisement and promotion of the sale of the tire chains which contained the patented anti-skid bar reinforcing devices in tread links. The agreements had a provision by which Respondent McKay could at its election terminate the same by written notice and in the instance of Respondent McKay such election was exercised on February 6, 1939. However, Respondent McKay has not discontinued its cooperative action with Respondent American and the other Respondent Members in their 177 joint, concerted and effective action to maintain fixed prices at which unpatented tire chains are offered for sale and sold by the said Respondent Members throughout the United States.

On October 7, 1935, Respondents American, Pyrene and Hodell (then trading under the name and style of Chain Products Company) executed written agreements similar

in form and substance to the aforesaid agreements which were executed by Respondent American and Respondent McKay on September 26, 1935. Subsequently thereto, namely on May 19, 1939, Respondent St. Pierre and on July 12, 1939, Respondent S. G. Taylor, executed with Respondent American written agreements similar to the one executed by Respondents American and McKay on September 26, 1935. The aforesaid written agreements which were executed by Respondents American, Hodell, Pyrene, St. Pierre and S. G. Taylor have not been terminated.

179 Pursuant to the terms and provisions of the aforesaid written agreements the Respondent Members who purport to be "licensees" thereunder have adhered to and made effective the price schedules on unpatented tire chains as announced and published by Respondent American.

Both prior to the execution of the aforesaid written agreements and subsequent thereto, representatives of the purported "licensor" Respondent American and "licensee" Respondents McKay, Hodell, St. Pierre, Pyrene and S. G. Taylor and representatives of other Respondent Members, during the course of meetings and at other times have communicated with each other and conferred concerning the prices which were to be announced as well as those which had been announced by Respondent American, the purported "licensor," under the aforesaid written agree-
180 ments. During the course of such meetings, communications and conferences, such representatives arrived at understandings and agreements between and among themselves concerning the prices that should be and were announced by Respondent American pursuant to the terms and provisions of the aforesaid written agreements, all for the purpose and with the effect of eliminating price competition between and among Respondent Members in their sale of unpatented tire chains.

Despite the provision in the aforesaid written agreements whereby Respondent American purported to "license" the aforesaid Respondent Members to *make* and sell the aforesaid anti-skid bar reinforced tire chains the said Respondent Members as "licensees" simply took advantage of certain provisions contained in the said written agreements whereby they purchased all parts of tire chains which contained the aforesaid patented anti-skid bar reinforced features from Respondent American at *factory* cost plus 10%. They then used such parts in the manufacture of unpatented tire chains which they then offered for sale and sold at the specified prices which had been agreed upon in the aforesaid written agreements and otherwise 182
by representatives of the Respondent Members, including the aforesaid "licensor" and "licensees."

Respondent Members did not intend at any time that the aforesaid written "license" agreements should operate as genuine license agreements pursuant to which the "licensees" would *make* and sell the aforesaid anti-skid bar reinforced tread member links. On the contrary they sought to use and did use such purported written "license" agreements as a subterfuge and device to conceal from and deceive the public and government officials into believing that the said written agreements were licenses to *make* and sell products of a patented invention whereas in fact Respondent Members never intended that the "licensees" should *make*, nor they *made*, the patented articles as pro- 183
vided for in the said written agreements. They have been used only as the fulcrum for unlawful price fixing agreements pursuant to the terms and provisions of which the "licensees" were more firmly bound to maintain prices on unpatented tire chains as fixed by the combination of Respondents set forth in Paragraph Five hereof. Said written agreements have also served Respondent Members as a device and scheme whereby resale prices were fixed and

maintained on tire chains made by the aforesaid purported "licensees" who only purchased from Respondent American the aforesaid anti-skid bar reinforced tread member links for use in the manufacture and sale of *unpatented* tire chains.

PARAGRAPH SEVEN: Pursuant to, in furtherance of and to make more effective the unlawful combination which is set forth in Paragraphs Five and Six hereof, Respondent Members American, McKay Pyrene and Hodell entered into an agreement during 1937 with Respondents Shirley, Olcott and Nichols, copartners trading under the firm name
185 Shirley, Olcott and Nichols (sometimes hereinafter referred to merely as Respondent Shirley) pursuant to the terms and provisions of which it was arranged and agreed for the latter to serve the said Respondent Members as their common agent in seeking to sell tire chains for them to the Federal Government through its various agencies in Washington, D. C.

The aforesaid agreement between and among the aforesaid Members and Respondent Shirley was performed, carried out and made effective after collaborations and conferences between and among their representatives where it was arranged for Respondent American to instruct Respondent Shirley to serve as a common agent for all of the said Respondent Members in submitting bids to
186 agencies of the Federal Government in the name of Respondent Shirley but on the behalf and for the benefit of the said Respondent Members for the sale of tire chains of all types, including those with the aforesaid patented anti-skid bar reinforced factors and those without such features, to the Federal Government at such prices as were prescribed by Respondent American after its collaborations and agreements with representatives of the other said Respondent Members, as previously alleged herein.

Respondent Shirley then proceeded in accordance with such instructions during 1937, 1938, 1939, 1940, 1941 and 1942, to submit bids to the Federal Government in his name on tire chains at prices previously agreed upon between and among Respondent Members and Respondent Shirley and which were named and specified by Respondent American. In accordance with agreements and prearrangements which Respondent American and Respondent Shirley had with other Respondent Members, as aforesaid, he allocated to each of said Respondent Members on equal shares the revenue secured from all contracts for tire chains which were awarded to him by the Federal Government pursuant to such bids. He also allocated equally among said Re- 188
spondent Members the freight costs involved in the shipment of such tire chains to the Federal Government under such contracts in accordance with agreements that he and representatives of said Respondent Members had previously reached.

On certain occasions when Respondent Shirley thus submitted bids under seal to the Federal Government in his own name but for the benefit of each of the said Respondent Members at prices specified by Respondent American said Members also submitted bids under their own name under seal to the Federal Government, usually identically the same prices bid by said Respondent Shirley but on certain other occasions at previously agreed upon differences therefrom. In many such instances where bids were 189
thus tied or made identical by prior agreements of Respondent Members and Respondent Shirley the officials of the Federal Government under the laws requiring them to secure competitive bids and to make award to the lowest bidder were compelled to make award by lot to Respondent Shirley or one of the said Respondent Members which had submitted such tie bids.

In particular instances where bidders other than said Respondent Members and Respondent Shirley submitted bids which were lower than the one collusive bid at fixed prices as submitted in the names of certain of the Respondent Members and Respondent Shirley, then Respondent American advised Respondent Shirley, with respect to future bidding, not to worry about such low bidders "as they will be controlled." In bidding subsequent to such advice from Respondent American to Respondent Shirley, competition with Respondents by such other low bidders lessened in quality and quantity.

191 Through the aforesaid methods, policy and practice of bidding Respondent Shirley and said Respondent Members were enabled to and did present to the United States government and its purchasing agencies an appearance of competition when in fact all of their bids were fixed and agreed upon prior to their submission by cooperative and collective action between and among their representatives. Through that procedure the United States government was denied the benefit of competition to which it was entitled under the laws which require that its purchasing officials secure competitive bids on such occa ons and make awards to the lowest bidder.

192 PARAGRAPH EIGHT: Each Respondent Member for the purpose and with the result of making more effective the matching of price quotations and the consequent hindrance, frustration, suppression and elimination of price competition through the unlawful combination alleged in Paragraph Five hereof, with the knowledge that each other Respondent Member simultaneously does likewise, generally refrains from quoting f.o.b. its place of production or shipment prices that are independent of and unrelated to the basing point, freight equalization, and zone systems or pricing practices, more fully described in Paragraphs Nine, Ten and Eleven hereof.

Each Respondent Member, with the knowledge that each other Respondent Member simultaneously does likewise, uses the basing point, freight equalization and zone delivered pricing practices and systems hereinafter more fully described in Paragraphs Nine, Ten and Eleven hereof, for the purpose and with the effect of keeping other Respondent Members informed as to what its prices are to be and of matching its quotations of delivered prices or delivered costs with those of other Respondent Members as made to any intending purchaser. Each Respondent Member thereby assists each other Member in maintaining a situation whereby purchasers are unable to find any difference or advantage in price in the delivered price or delivered 194
cost quotations of all Respondent Members. Each Respondent Member uses the aforesaid basing point, freight equalization and zone delivered pricing practices and systems for the purpose and with the result of making more effective the hindrance, frustration and suppression of competition alleged in Paragraph Five hereof.

PARAGRAPH NINE: *Basing Point Pricing System*: Each Respondent Member in arriving at the sums or amounts quoted in its published price lists relating to Welded Chain provides that the delivered cost to any intending purchaser or user at the latter's destination shall be the figure or sum resulting from the use of a formula composed of a basing price plus freight from a single basing point (Pittsburgh, Pennsylvania) to the destination of such purchaser or user 195
irrespective of whether shipment is to be made or is made from such basing point or another location from which other and different freight rates actually apply.

Each Respondent Member uses and specifies in its price lists relating to Welded Chain, the same base point and the same base price for such base point used that is used and specified by other Respondent Members. The result is that when the same base prices of each Respondent Mem-

ber are so used as factors in the formula of base price plus the same freight factor from the base point to a purchaser's destination, their quoted delivered cost or price on Welded Chain to any intending purchaser or user at his destination is exactly matched and made identical by all Respondent Members at any given time.

Said Respondent Members produce Welded Chair and ship same to their respective customers from numerous points other than the point used, as aforesaid, as a basing point.

Each Respondent Member, in its use of the aforesaid basing point practice, notwithstanding differences in the actual
197 freight rates from its place of business and manufacture to the different locations of its different customers with lower rates applying to those nearby than to those more distantly located, habitually and systematically demands, charges, accepts and receives as an inherent and necessary incident to the said basing point practice of delivered price quotations, larger sums and amounts for products of equal quality and quantity from its customers located at or near its place of business or manufacture than from other customers located at greater distances. Such nearby customers are thereby required to pay more, and the more distant customers to pay less, to each Respondent Member for Welded Chain than would be the case if the forces of competition made and determined the prices at which Respond-
198 ent Members sell chain and chain products.

Each Respondent Member, as aforesaid, uses said basing point pricing practice as a device by which it not only suppresses price competition and deprives its nearby customers of price advantages which they would, under competitive conditions, enjoy by reason of their proximity to points of production, but also as an inherent and necessary incident to the operation of the aforesaid basing point

method of pricing, unfairly discriminates against its nearby customers in favor of those more distantly located.

PARAGRAPH TEN: *Freight Equalization Pricing System*: Each Respondent Member, in arriving at the sums or amounts quoted in its published price lists relating to Weldless Chain, provides that the delivered costs to any intending purchaser or user at the latter's destination shall be the figure or sum resulting from the use or application of a formula of an f.o.b. factory price quotation plus whatever freight factor is necessary to exactly equalize or match the sum of a base price at four specified basing points, namely, f.o.b. York, Pennsylvania; Cleveland, Ohio; Cincinnati, Ohio; or Bridgeport, Connecticut, plus freight therefrom 200
to the buyers' destination as announced by it or other of the Respondent Members, in such manner, form and substance as to enable, and which does enable, all Respondent Members to match their delivered costs on Weldless Chain as quoted by them to any intending purchaser or user at his destination at any given point of time.

Said Respondent Members produce Weldless Chain and ship same to their respective customers from points other than the points named as aforesaid as f.o.b. points from which freight is equalized and delivered costs matched.

Each Respondent Member, in its use of the aforesaid freight equalization pricing practice, notwithstanding differences in the actual freight rates from its place of busi- 201
ness and manufacture to the different locations of its different customers with lower rates applying to those nearby than to those more distantly located, habitually and systematically demands, charges, accepts and receives as an inherent and necessary incident to the said freight equalization practice of price quotations, larger sums and amounts for products of the same quality and quantity from its customers located at or near its place of business

and manufacture than from other customers located at greater distances. Such nearby customers are thereby required to pay more, and its more distant customers to pay less, to such Respondent Member for Weldless Chain and chain products than would be the case were its price quotations determined by the forces of competition.

Each Respondent Member as aforesaid uses said freight equalization pricing practice as a device by which it not only suppresses price competition and deprives its nearby customers of price advantages which otherwise they would naturally enjoy by reason of their proximity to places of production, but also discriminates against such nearby cus-
203 tomers in favor of those more distantly located.

PARAGRAPH ELEVEN: *Zone Pricing System*: Each Respondent Member in arriving at the sums or amounts quoted in its published price lists relating to Tire Chains provides that the *delivered* cost of tire chains to any intending purchaser or user at the latter's destination shall be identically the same *delivered* cost quoted to all other purchasers or users in the United States wherever located, irrespective of the fact that some such intending purchasers and users are located at or near such Respondent Member's place of manufacture and shipment and other purchasers and users are located thousands of miles away; also irrespective of the fact that the cost of shipping tire chains from its place of manufacture ranges from zero, with re-
204 spect to those customers who take delivery at its place of manufacture, to an amount equal to a substantial part of the net price realized from the delivered price of Tire Chains sold to customers located at distances of 1,000 miles or more from the place of manufacture.

Each Respondent Member uses the aforesaid zone pricing practice in order that it and other Respondent Members might match, and through its use they are enabled to match,

the delivered cost quoted by each of the others to any intending purchaser or user of Tire Chains at any destination at a given time.

Each Respondent Member, through the use of the aforesaid zone pricing practice, notwithstanding differences in the actual freight rates from its place of business and manufacture to the different locations of its different customers with lower rates applying to those nearby than to those more distantly located, habitually and systematically demands, charges, accepts and receives as a necessary incident to the aforesaid zone pricing practice of delivered price quotations, larger sums and amounts for products of equal quality and quantity from its respective customers 206
located at or near its place of business or manufacture, than from other customers located at greater distances. Such nearby customers are thereby required to pay more, and the more distant customers to pay less, to it for Tire Chains than would otherwise be the case if the forces of competition made and determined the price quotations of each such Respondent Member.

Each Respondent Member as aforesaid uses said zone pricing practice as a device by which it not only suppresses price competition and deprives its nearby customers of price advantages which otherwise they would naturally enjoy by reason of their proximity to points of production, but as a necessary incident to said zone pricing practice discriminates against its nearby customers in favor of 207
other customers more distantly located.

PARAGRAPH TWELVE: The inherent and necessary effect of the adoption and maintenance by the Respondent Members of the delivered price systems described and alleged in Paragraphs Eight, Nine, Ten and Eleven herein includes all and singularly the following, to wit:

(1) The elimination of price competition between Respondent Members in the sale of chain and chain products at locations adjacent to each of the several places of fabrication of said products;

(2) Substantial lessening of competition among Respondent Members in all parts of the United States by virtue of each Respondent Member voluntarily and reciprocally surrendering and canceling the inherent advantage it has over its competitors within the market area nearer freight-wise to its factory than to a factory of a competitor in consideration of a similar surrender and cancellation by each of the other Respondent Mem-
209 bers;

(3) The levying of an additional financial burden in varying arbitrary sums for the sole purpose of reimbursing Respondent Members for concessions voluntarily made by them to some of their customers in the accomplishment of Respondents' unlawful purpose to destroy price competition in the sale of chain and chain products in commerce and to create for the said Respondent Members a monopoly therein and thereof;

(4) The fixing and control by Respondents' concurrent action of an arbitrary substantial portion of the total cost of the product to any and every purchaser upon a basis having no relation to total cost of pro-
210 duction, sales and transportation;

(5) The maintenance of monopolistic unfair and oppressive discrimination against purchasers of chain and chain products in large areas of the United States by depriving such purchasers of the advantage in cost otherwise accruing to them from their proximity to the factories of Respondent Members;

(6) The levying upon nearby purchasers of chain and chain products increases in net prices of such

products over what said net prices on such products to such customers would have been if said prices had been fixed by competition among Respondents, such increases in net prices being approximately equal to decreases in net prices afforded by Respondents to distantly located customers. Each Respondent Member thus compels its nearby customers to pay not only the actual freight rates on the products purchased by them respectively, but also in effect compels such purchasers to pay portions of the cost of transportation of said products to other purchasers distantly located from the factory of such Respondent Member.

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PARAGRAPH THIRTEEN: The combination and the acts, practices, methods, policies, agreements and understandings of the Respondents as hereinbefore alleged, all and singularly, are unfair and to the prejudice of the public; deprive the public of the benefit of competition; are discriminatory against some buyers and users of chain and chain products; have a dangerous tendency to and have actually hindered, frustrated, suppressed and eliminated competition in the sale of chain and chain products in commerce within the intent and meaning of the Federal Trade Commission Act; have the tendency and capacity to restrain unreasonably, and have restrained unreasonably, such commerce in said products; have a dangerous tendency to create in Respondents a monopoly in the sale and distribution of such products and constitute unfair methods of 213
competition and unfair and deceptive acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

COUNT II

The Charge Under the Clayton Act

Paragraph One: Pursuant to the provisions of Section 2 of an Act of Congress approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes," commonly known as the Clayton Act, as amended by an Act of Congress approved June 19, 1936, commonly known as the Robinson-Patman Act, the Commission, having reason to believe that the parties hereinafter specifically named and more particularly described as Respondents in this Count
215 II, sometimes hereinafter referred to as Respondent Members and included among those named as Respondents in the caption hereof, have violated and are violating the provisions of said Act of Congress as so amended, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, the Commission hereby issues its amended complaint, stating its charges in such respect as follows:

Nature of Charges

Paragraph Two: The charges hereinafter contained in this Count II are that each of the Respondent Members
216 has been and is now unlawfully discriminating as between its customers in the prices it charges, demands, accepts and receives in connection with the sale of chain and chain products in commerce.

DESCRIPTION OF RESPONDENTS; DEFINITIONS AND EXPLANATIONS OF TERMS; DESCRIPTION AND HISTORY OF INDUSTRY AND THE COMMERCE OF RESPONDENTS

PARAGRAPHS THREE and FOUR: As Paragraphs Three and Four of this Count II, the Commission incorporates Paragraphs Three and Four, inclusive of Count I of this amended complaint to precisely the same extent and effect as if each and all of them were set forth in full and repeated verbatim in this Count II, except the definition of the term "commerce." The term "commerce," as hereinafter used, means "commerce" as defined and set forth in the Clayton Act.

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OFFENSES CHARGED

PARAGRAPH FIVE: Since June 19, 1936, and while engaged as aforesaid in commerce among the several States of the United States and in the District of Columbia, each of the Respondent Members, American, Bridgeport, McKay, Pyrene, Hodell, St. Pierre, Taylor, Cleveland, Columbus, International, Nixdorff, Peerless, Round, Russell, Seattle, Turner, Western and Woodhouse has been and is now in the course of such commerce, discriminating in price between purchasers of said commodities of like grade and quantity sold for use, consumption or resale within the several States of the United States and the District of Columbia in that each of the respondents has been and is now systematically selling such commodities to many purchasers at a price higher than the price at which commodities of like grade and quantity are sold by it to other purchasers and users.

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PARAGRAPH SIX: Each of the respondents uses a delivered pricing system and practice for determining, calculating,

making up, using, announcing, publishing and distributing its quotations and offers to its respective customers in selling them chain and chain products in commerce. Each of the respondents, in using its said delivered pricing system for quoting its delivered prices and in making sales of chain and chain products in commerce in accordance and in connection therewith, discriminates as between its customers in net prices realized on chain and chain products of like grade and quantity. The discriminations by each said respondent thus effected are systematic and result, in part, because of its failure to "make only due allowance for differences in the cost of manufacture, sale, or delivery
221 resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered" and are discriminatory to such an extent that the net prices paid by customers located at or near its factory door in many instances amount to much more than the net prices realized by such respondent on chain and chain products of like grade and quantity sold to its customers located hundreds of miles away. The systematic discriminations in net prices thus effected by each of the respondents against nearby customers and in favor of its more distantly located customers are inherent in the use of the aforesaid delivered pricing system of each of the respondents. There are also involved in said system MATCHED delivered price quotations or offers as made by all respondents to any given customer, so that such customer in considering or accepting any of
222 such offers is denied the opportunity ordinarily afforded under price competition to bargain with one Respondent Member against another.

PARAGRAPH SEVEN: Each of the Respondent Members engaged in the sale of welded chain and chain products practices the systematic regional discriminations in the

sale of such products as alleged in the immediately preceding Paragraph Six of this Count II pursuant to and in accordance with its practice of making on such products varying quotations on a delivered basis calculated by arbitrarily using a base price f.o.b. Pittsburgh plus charges for freight from Pittsburgh as though shipments were to be made therefrom to each of the various destinations although actually these shipments are regularly made from other locations, the points of production, from which different freight charges actually apply.

Each of the Respondent Members engaged in the sale of weldless chain and chain products practices the systematic regional discriminations in the sale of such products as 224
alleged in the immediately preceding Paragraph Six of this Count II pursuant to and in accordance with its practice of making on such products varying quotations on a delivered basis calculated by arbitrarily using a base price f.o.b. each of a number of base points plus charges for freight from such basing points as though shipments were to be made therefrom to each of the various destinations. The governing basing point in any given case is that where the combination of the applicable base price plus the said calculated charge for freight is not as high as the combination of some other base price plus the calculated charge for freight. In numerous instances actual shipments of such products are not made from the base point used in making the aforesaid calculation of the costs of the products de- 225
livered to the purchaser at destination. On the contrary, actual shipments are regularly made to many destinations from production points from which different freight charges actually apply.

PARAGRAPH EIGHT: Each of the said respondents has been and is now classifying its customers to receive from

it quantity, trade and other discounts from quoted prices so that by virtue of such classifications and action pursuant thereto, each such respondent charges, demands, accepts and receives higher prices in connection with sales of chain and chain products in commerce from some of its customers than from others, even though they are competitively engaged with the customers who pay such lower prices.

PARAGRAPH NINE: Each of the said respondents practices the aforesaid systematic, regional and other discriminations in price for the purpose and with the effect of enabling all the respondents to exactly MATCH their de-
227 livered price offers to sell chain and chain products of like grade and quantity in commerce to any given prospective purchaser at any given destination and to maintain such matched offers.

EFFECTS OF PRICE DISCRIMINATIONS PRACTICED BY RESPONDENTS

PARAGRAPH TEN: The inherent and necessary effect of the practice by the Respondent Members of the discriminations described and alleged in Paragraphs Five, Six, Seven and Eight of this Count II herein includes all and singularly the following, to wit:

(1) The elimination of price competition between
228 Respondent Members in the sale of chain and chain products at locations adjacent to each of the several places of fabrication of said products;

(2) Substantial lessening of competition among Respondent Members in all parts of the United States by virtue of each Respondent Member voluntarily and reciprocally surrendering and canceling the inherent

advantage it has over its competitors within the market area nearer freight-wise to its factory than to a factory of a competitor in consideration of a similar surrender and cancellation by each of the other Respondent Members;

(3) The levying of an additional financial burden in varying arbitrary sums for the sole purpose of reimbursing Respondent Members for concessions voluntarily made by them to some of their customers in the accomplishment of Respondents' unlawful purpose to destroy price competition in the sale of chain and chain products in commerce and to create for the said Respondent Members a monopoly therein and thereof; 230

(4) The fixing and control by Respondents' concurrent action of an arbitrary substantial portion of the total cost of the product to any and every purchaser upon a basis having no relation to the combined cost of production, sales and transportation;

(5) The maintenance of monopolistic, unfair, and oppressive discrimination against purchasers of chain and chain products in large areas of the United States by depriving such purchasers of the advantage in cost which would otherwise accrue to them from their proximity to the factories of Respondent Members;

(6) The levying upon nearby purchasers of chain and chain products of increases in net prices of such products over what said net prices to such customers would have been if fixed by competition among Respondents, such increases in net prices being approximately equal to decreases in net prices afforded by Respondents to distantly located customers. Each Respondent Member thus compels its nearby customers to pay not only the actual freight rates on the products 231

purchased by them respectively, but also in effect compels such purchasers to pay portions of the cost of transportation of said products to other purchasers distantly located from the factory of such Respondent Member.

PARAGRAPH ELEVEN: Further effects of the said discriminations in price made by said Respondent Members as alleged and described in Paragraphs Five, Six, Seven and Eight of this Count II herein may be substantially to lessen competition between the buyers of said chain and chain products from respondents receiving said lower discrimina-
233 tory prices and other buyers from respondents competitively engaged with such favored buyers who do not receive such favorable prices; tend to create a monopoly in the lines of commerce in which buyers from respondents are engaged; and to injure, destroy, and prevent competition in the lines of commerce in which those who purchase from Respondent Members are engaged between the said beneficiaries of said discriminatory prices and said buyers who do not and have not received such beneficial prices as well as to lessen competition in the lines of commerce in which respondents are engaged.

CONCLUSION

234 PARAGRAPH TWELVE: The aforesaid acts of each of the said respondents constitute violations of the provisions of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (49 Stat. 1526; 15 U. S. C. A., Sec. 13, as amended).

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this 9th day of October, A. D. 1945, issues this its amended complaint.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this, its amended complaint, to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this 9th day of October, A. D., 1945.

By the Commission.

OTIS B. JOHNSON,
Secretary.

Filed October 9, 1945.

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Answer of the Chain Institute, Inc., and George J. Campbell, Jr., as Vice-President of the Chain Institute, Inc.

Come now the respondents, The Chain Institute, Inc., hereinafter referred to as "Institute," and George J. Campbell, Jr., as Vice President of The Chain Institute, Inc., hereinafter referred to collectively as "said respondents," by their Attorney, Clarence M. Dinkins, and in answer to the amended complaint heretofore filed against them by the Federal Trade Commission, say:

1. They deny that they individually, jointly, as representatives of any kind, or in any manner in connection with any of the other respondents named in said complaint, or 237
with any others, have violated any of the provisions of Section 5 of the Federal Trade Commission Act and/or Section 2(a) of the Clayton Act as alleged in said complaint.

2. They deny all of the allegations of said complaint of which they or any of them have knowledge, not hereinafter specifically admitted.

238 *Answer of the Chain Institute, Inc., and George J. Campbell, Jr., as Vice-President of the Chain Institute, Inc.*

3. They allege that among the objects and purposes for which the Institute was organized are the following which appear in its Certificate of Incorporation:

"To promote the use of welded and weldless chain in domestic and foreign markets.

"To collect and disseminate information as to the uses of chain in existing fields; as to its possible use in new fields of industrial activity, and as to economic conditions and practices in such markets.

239 "To encourage and contribute to the development of standardization of that scope which may be deemed both practical of accomplishment and beneficial to the economic position of the chain industry, and to promote the use among producers, distributors and consumers of such standards and specifications as the Institute may endorse.

"To encourage and participate in the development of simplification programs designed to eliminate the use of sizes, grades, styles and/or types of chain the demand for which evidences their non-essentiality, and to promote recognition by producers, distributors and consumers of such simplified practice programs as the Institute may endorse.

"To encourage and or contribute to such metallurgical and engineering research as may directly relate to the 240 products of the chain industry, and to collect and disseminate such class and degree of technological information and statistics as may be beneficial to the producers, distributors and consumers.

* * * * * *

"To preserve the position of the Institute as a constructive agency by countenancing no action which may violate, in spirit or substance, the provisions of Federal or State statutes."

Answer of the Chain Institute, Inc., and George J. Campbell, Jr., as Vice-President of the Chain Institute, Inc. 241

PARAGRAPH ONE (COUNT I)

Said respondents are advised by their Counsel that the charges speak for themselves; that the contents of this paragraph are merely conclusions of the pleader and need not be answered, nevertheless, Paragraph One is denied.

PARAGRAPH TWO

Said respondents are advised by their Counsel that the charges speak for themselves; that the contents of this 242
paragraph are merely conclusions of the pleader and need not be answered, nevertheless, Paragraph Two is denied.

PARAGRAPH THREE

Sub-paragraph (1) is admitted.

Sub-paragraph (20) is admitted.

Sub-paragraph (21) is denied.

Sub-paragraph (22). It is admitted that Wm. D. Kirkpatrick was President of said Institute at the time of the issuance of the original complaint.

Sub-paragraph (23). The allegation that respondent 243
Frank A. Bond is an official of the Institute in dealing with freight rate matters is denied.

Sub-paragraph (24). It is admitted that George J. Campbell, Jr., was Vice-President of said Institute at the time of the issuance of the original complaint.

Two paragraphs immediately following sub-paragraph (27). Respondent Hodell Chain Company is not a member

of said Institute. All of said respondents covered by this Answer deny both individually and collectively that they have participated in any of the cooperative or collective action alleged herein or that they engaged in any unlawful activity.

As to the remainder of Paragraph Three which has not been answered said respondents are without knowledge.

PARAGRAPH FOUR

245 Said respondents are without sufficient knowledge about the allegations contained in Paragraph Four to form a belief. Answering specifically sub-paragraph eight said respondents are without knowledge of any alleged acts, methods, practices and policies which have lessened competition between "Respondent Members" but on information aver that there always has been and now is active and substantial competition between said members.

PARAGRAPH FIVE

Each and every allegation in Paragraph Five is denied.

PARAGRAPH SIX

246 Said respondents are without knowledge as to the allegations contained in Paragraph Six.

PARAGRAPH SEVEN

Said respondents are without knowledge as to the allegations contained in Paragraph Seven.

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PARAGRAPH EIGHT

Said respondents are without knowledge as to the allegations contained in Paragraph Eight.

PARAGRAPH NINE

Said respondents are without knowledge as to the allegations contained in Paragraph Nine.

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PARAGRAPH TEN

Said respondents are without knowledge as to the allegations contained in Paragraph Ten.

PARAGRAPH ELEVEN

Said respondents are without knowledge as to the allegations contained in Paragraph Eleven.

PARAGRAPH TWELVE

Said respondents are without knowledge as to the allegations contained in Paragraph Twelve. 249

PARAGRAPH THIRTEEN

Said respondents are without knowledge as to the allegations contained in Paragraph Thirteen.

250 *Answer of the Chain Institute, Inc., and George J. Campbell, Jr., as Vice-President of the Chain Institute, Inc.*

PARAGRAPH ONE (COUNT II)

Said respondents are advised by their Counsel that the charges speak for themselves; that the contents of this paragraph are merely conclusions of the pleader and need not be answered, nevertheless, Paragraph One is denied.

PARAGRAPH TWO

251 Said respondents are advised by their Counsel that the charges speak for themselves; that the contents of this paragraph are merely conclusions of the pleader and need not be answered, nevertheless, Paragraph Two is denied.

PARAGRAPHS THREE AND FOUR

Said respondents incorporate in full herein their Answers in Paragraphs Three and Four, of Count I of this amended complaint.

PARAGRAPH FIVE

252 Said respondents are without knowledge as to the allegations contained in Paragraph Five.

PARAGRAPH SIX

Said respondents are without knowledge as to the allegations contained in Paragraph Six.

Answer of the Chain Institute, Inc., and George J. Campbell, Jr., as Vice-President of the Chain Institute, Inc.

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PARAGRAPH SEVEN

Said respondents are without knowledge as to the allegations contained in Paragraph Seven.

PARAGRAPH EIGHT

Said respondents are without knowledge as to the allegations contained in Paragraph Eight.

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PARAGRAPH NINE

Said respondents are without knowledge as to the allegations contained in Paragraph Nine.

PARAGRAPH TEN

Said respondents are without knowledge as to the allegations contained in Paragraph Ten.

PARAGRAPH ELEVEN

Said respondents are without knowledge as to the allegations contained in Paragraph Eleven. 255

PARAGRAPH TWELVE

Said respondents are without knowledge as to the allegations contained in Paragraph Twelve.

256 *Answer of the Chain Institute, Inc., and George J. Campbell, Jr., as Vice-President of the Chain Institute, Inc.*

WHEREFORE, said respondents having fully answered this Amended Complaint pray that it may be dismissed as to them.

THE CHAIN INSTITUTE, INC.
GEORGE J. CAMPBELL, JR., as VICE-PRESIDENT of THE CHAIN INSTITUTE, INC.

By CLARENCE M. DINKINS.
Their Attorney,
257 532 Shoreham Building,
Washington 5, D. C.

November 26, 1945.
Filed November 27, 1945.

Answer of American Chain & Cable Company, Inc. and of William D. Kirkpatrick, Respondents, to the Amended Complaint.

Now come Respondents American Chain & Cable Company, Inc. and William D. Kirkpatrick, appearing herein by their attorney Frederick S. Duncan, and, reserving all
258 rights in respect to jurisdiction, misjoinder of complaints and counts in the proceeding, answer the Amended Complaint filed in the above entitled proceeding as follows:

COUNT I

(1) Answering the allegations of Paragraph One of Count I of the Amended Complaint, these Respondents deny that this proceeding is pursuant to the Federal Trade

Answer of American Chain & Cable Company, Inc., and of William D. Kirkpatrick, Respondents, to the Amended Complaint. 259

Commission Act; deny that the Commission has reason to believe, or that the fact is, that the Respondents or these Respondents have violated Section 5 of said Act; and deny that this proceeding is in the public interest.

(2) These Respondents severally deny each and every allegation of Paragraph Two of Count I of the Amended Complaint.

(3) These Respondents admit the allegations of subparagraphs (1) and (2) of Paragraph Three of the Amended Complaint and that the Respondent Kirkpatrick was at one time President of the Chain Institute, Inc., but are without personal knowledge of the matters of facts set forth in paragraphs 3 to 20 inclusive, and 23 to 27 inclusive of Paragraph Three of the Amended Complaint. As to subparagraph 21, these Respondents aver upon information and belief that Walter S. McCann died in the early Summer of 1944. Respondents deny all remaining allegations of Paragraph Three of the Amended Complaint. 260

(4) These Respondents admit that the descriptions of the several types of chain contained in Paragraph Four of the Amended Complaint and the statements concerning the production of the same are in the main substantially correct. Respondents also admit that welded chain, weldless chain and tire chains produced by the American Chain & Cable Company, Inc. are sometimes sold and delivered to wholesalers, dealers, and customers in the United States of America at points other than in the States of origin of the shipments. 261

These Respondents admit that prior to the adoption of the practices described in said Complaint the Respondent American was and aver that it still is in substantial and

262 *Answer of American Chain & Cable Company, Inc., and of William D. Kirkpatrick, Respondents, to the Amended Complaint.*

active competition with *other* Respondent Members of the Chain Institute in making and seeking to make sales of chain products between and among the several States of the United States of America.

Except as herein specifically admitted these Respondents deny all allegations of Paragraph Four of said Complaint.

(5) Respondents deny the allegations contained in the two introductory sub-paragraphs of Paragraph Five of said Complaint and further deny each and all of the alle-
263 gations contained in sub-paragraphs 1 to 17 inclusive of said Paragraph Five.

(6) Respondent American admits that at certain periods it was the owner of, or had rights under, certain patents relating to Tire Chains, including Parsons No. 723,299 and Weed No. 768,495, and that it was engaged in extensive litigation thereunder; and that it later owned certain additional patents relating to reinforced tire chain under which licenses were granted to certain of the respondent corporations; that some of these licenses are still in force; that in these licenses Licensor reserves the right to prescribe the prices at which the several licensees would be permitted to sell products coming within the licensed patents, but
264 further avers that in 1943, because of existing War conditions, it cancelled and surrendered all provisions and reservations contained in and rights given by said license agreements for prescribing prices at which the patented products might be sold by the licensees.

Except as herein specifically admitted each and all of the allegations of Paragraph Six of said Complaint are hereby denied.

Answer of American Chain & Cable Company, Inc., and of William D. Kirkpatrick, Respondents, to the Amended Complaint.

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(7) These Respondents admit that from about 1937 to 1942 inclusive Respondents Shirley, Olcott & Nichols entered into certain agreements with the Procurement Division of the United States Treasury Department regarding tire chains and that Respondent American supplied tire chains to Shirley, Olcott & Nichols that enabled said firm to supply and fill some orders placed with it in accordance with the provisions of the agreements with the Procurement Division aforesaid; but these Respondents deny that said arrangements, agreements and contracts were illegal or in violation of the statutes of the United States and were not in any way to the disadvantage or loss of the United States Government or any of its agencies. These Respondents aver that all of the facts with respect to the relations between Shirley, Olcott & Nichols, American and its sublicensees were fully disclosed to and known by the United States Government and its said contracts and agreements with said Shirley, Olcott & Nichols were made and entered into by the Treasury Department, Procurement Division with full knowledge of all of the facts and with the approval of the United States Government as to the form and substance of such contracts; and because the same were recognized by the Government as beneficial to its several agencies. These Respondents further aver that such arrangements, agreements and contracts were proper and legal and to the advantage and benefit of said Government and its agencies and that the Government was put to no disadvantage or loss of any kind in making and carrying out the same.

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Except as hereinabove specifically admitted these Respondents deny all the allegations of Paragraph Seven of the Complaint.

268 *Answer of American Chain & Cable Company, Inc., and of William D. Kirkpatrick, Respondents, to the Amended Complaint.*

(8) Further answering in respect to Paragraphs 6 and 7 of the Amended Complaint these Respondents aver that in October 1942 after conference with the Procurement Division of the Treasury Department and officials of the Federal Trade Commission and after a futile endeavor to bring about a joint consideration by the said Treasury Department and the Federal Trade Commission of questions raised by the Commission in respect to the propriety or legality of the said contracts issued by the Treasury Department, Procurement Division to Shirley, Olcott & Nich-
269 ols, Respondent American with the knowledge of the Federal Trade Commission and prior to the preparation and filing of the Complaint herein terminated, by letter of October 15, 1942, a copy of which was immediately given to the Federal Trade Commission, the arrangements previously existing with Shirley, Olcott & Nichols regarding supplying said firm with tire chains to meet contracts awarded to said firm by the United States Treasury Department Procurement Division and that thereafter no further contracts were entered into with Shirley, Olcott & Nichols, for supplying them with the chains and no further contracts for tire chains were awarded to Shirley, Olcott & Nichols by the United States Government for any year subsequent to 1942.

270 (9) These Respondents deny the allegations of Paragraph Eight of said Complaint as therein stated; and aver that American uses various methods of pricing and distributing its several chain products, including quoting f.o.b. factory or place of shipment.

These Respondents deny that where American prices and distributes its chain products in other ways than quoting f.o.b. its place of production or shipment such other pricing

and distributing practices are for the purpose or have the result alleged in Paragraph Eight of said Complaint.

These Respondents further aver that in no instances where American uses the basing point, freight equalization or zone delivered pricing practices and systems, such practice and system and any similarity in quoted prices that may exist between prices quoted by American and other Respondents is the result of any conspiracy or understanding with other respondents; but aver that it is the result of the desire of American to engage in competition with other manufacturers in various parts of the United 272
States and to make its products widely available to the public at prices acceptable to the public and that will permit Respondent to continue in business with a reasonable profit.

(10) In answer to the allegations of Paragraphs 8, 9, 10 and 11 of the Amended Complaint these Respondents admit that in connection with the sale of American's various chain products it uses different pricing and distribution methods, including (1) quoting a price f.o.b. its place of production or shipment; (2) quoting a delivered price at purchaser's destination, involving a freight factor either from (a) a single basing point or (b) from several basing points in different States with freight equalization; and 273
(3) quoting a single price delivered at any point in the United States, with modifications.

These Respondents deny that such practices were adopted or carried out by American as the result of any conspiracy, arrangement, agreement or cooperation with other manufacturing Respondents or were adopted and are being practiced for the purpose of hindering, suppressing and eliminating price competition or for any other purpose

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or with any such result as alleged in Paragraphs 8 to 11 inclusive of said Complaint. Except as herein expressly admitted these Respondents deny all of the allegations of Paragraphs 8 to 11 inclusive of said Complaint.

These Respondents further deny that American has cooperatively employed with others for the purposes alleged in said Complaint what is described in Paragraphs 8, 9, 10 and 11 thereof as basing point, freight equalization and zone systems or pricing practices. They admit that Welded Chain, Weldless Chain and Tire Chain are sold at destina-
275 tion prices, but deny that there was any mutual understanding, agreement or combination to sell such products at any agreed price or in any particular manner.

Said Respondents further allege that the use of delivered prices in connection with a basing point, freight equalization, or nation-wide delivery at a uniform price, freight free, has been common in the Welded Chain, Weldless Chain and Tire Chain sections of the chain industry respectively for upwards of thirty years and was not the result of any combination or agreement, expressed or implied, between Respondents, but in each instance has been the natural development of basic economic conditions in such branch of the chain industry and is the result of active competition between manufacturers of the several types of chain. These
276 Respondents further aver that such systems of pricing and distribution resulting in delivered prices is consistent with free and open competition in the industry and does not result in and has not in any case of the chain industry resulted in monopolistic control over prices or indiscriminatory treatment between customer nor does it constitute an unfair method of competition. Respondents further aver that on the contrary said pricing and distributing methods using delivered prices, promotes competition in the chain

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industry and that the elimination of such pricing and distributing methods would result in establishing monopolies and monopolistic control by reason of geographic location of the several respondents' plants, thereby destroying competition and eliminating from the industry those manufacturers whose continuance in business is dependent upon their being able to sell chain products on a delivered price basis.

Except as herein expressly admitted, these Respondents deny each and every allegation of Paragraphs 8 to 11 inclusive of Count I of the Amended Complaint.

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(11) The Respondent Kirkpatrick denies that he has participated in any cooperative and collective action with the Respondent, American Chain & Cable Company, Inc. or with any other respondent in performing or putting into operation, or making effective any unlawful method, system, practice and policy as alleged in the several paragraphs of the Amended Complaint.

(12) These Respondents deny each and every allegation of Paragraphs 12 and 13 of Count I of the Amended Complaint.

COUNT II

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(13) Answering the allegations of Paragraph One, Count II, of the Amended Complaint these respondents deny that this proceeding is pursuant to the Clayton Act; deny that the Commission has reason to believe, or that the fact is, that the Respondents or these Respondents, have violated or are violating the provisions of said Act as amended, and deny that this proceeding is in the public interest.

280 *Answer of American Chain & Cable Company, Inc., and of William D. Kirkpatrick, Respondents, to the Amended Complaint.*

(14) These Respondents deny the charges contained in paragraph two of Count II of the Amended Complaint.

(15) Answering the allegations of paragraphs three and four of Count II of the Amended Complaint, these Respondents refer to the allegations of paragraphs three and four of their Answer to Count I hereof and adopt and repeat same in so far as the same are applicable, as their answer to the allegations of paragraphs three and four of Count II of said Complaint.

281 (16) These Respondents deny each and every allegation of paragraphs five, six, seven, eight, nine, ten, eleven and twelve of Count II of the Amended Complaint.

(17) These Respondents further allege that the matters of pricing and distributing on the basis of a Basing Point or multiple Basing Points with freight equalization, or nation-wide delivery at a uniform price, as set forth in Count I and in Count II of the Amended Complaint, involve solely economic problems and do not involve question of unfair trade practices and are not within the jurisdiction of the Federal Trade Commission or Section 5, or other sections, of the Trade Commission Act as amended.

282 These Respondents further allege that in so far as the Amended Complaint relies upon the charges of conspiracy by and between these Respondents and others, the Federal Trade Commission is without jurisdiction under the Federal Trade Commission Act or otherwise to try such issues.

Answer of American Chain & Cable Company, Inc., and of William D. Kirkpatrick, Respondents, to the Amended Complaint. 283

WHEREFORE, these Respondents pray that the Complaint herein be dismissed and an order to such effect be duly entered.

Dated at New York, November 27th, 1945.

AMERICAN CHAIN & CABLE COMPANY, INC. and
WILLIAM D. KIRKPATRICK, Respondents.

By FREDERICK S. DUNCAN
Their Attorney.

Filed November 28, 1945. 284

Motion for Leave to File Amended Answer.

Now come Respondents AMERICAN CHAIN & CABLE COMPANY, INC. and WILLIAM D. KIRKPATRICK and aver that through inadvertence the joint Answer filed on their behalf November 28, 1945 contains inaccuracies in statement that should be corrected in order properly to set forth Respondents' position in this proceeding.

Upon this petition and the annexed Affidavit of William D. Kirkpatrick, one of these Respondents, these Respondents therefore petition this Commission for an order granting leave to file the Amended Answer to the Amended Complaint herein, seven copies of which are submitted herewith. 285

Respectfully,

AMERICAN CHAIN & CABLE COMPANY, INC.,
WILLIAM D. KIRKPATRICK,
By FREDERICK S. DUNCAN
Their Attorney.

Dated at New York, N. Y.,
December 29th, 1945.
Filed December 29, 1945.

286 *Motion for Leave to File Amended Answer.*

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

WILLIAM D. KIRKPATRICK, being duly sworn, deposes as follows:

I am one of the Respondents in the above entitled proceeding. On my behalf and that of the AMERICAN CHAIN & CABLE COMPANY, INC. of which I am a Vice President an Answer was filed on November 28, 1945 in this proceeding to the Amended Complaint herein.

I have recently examined said Amended Answer with officers of the American Chain & Cable Company, Inc. and
287 with the attorney acting on our behalf. We find that through inadvertence the said Joint Answer filed on our behalf on November 28, 1945 contains statements and averments that are inaccurate and that should be corrected in order properly to present our position in this proceeding. We have therefore instructed our counsel to present to the Federal Trade Commission a petition on our behalf for an order granting us leave to file an Amended Answer to the Amended Complaint, copies of which are to be submitted with such petition.

WILLIAM D. KIRKPATRICK

Sworn to before me, this
28th day of December, 1945.

CATHERINE VANDER WENDE,
288 Notary Public.

CATHERINE VANDER WENDE
NOTARY PUBLIC, Westchester County
N. Y. Clerk's No. 101, Reg. No. 73-V-7
Commission expires March 30, 1947
Filed December 29, 1945.

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Order Granting Leave to Respondents American Chain & Cable Company, Inc., and William D. Kirkpatrick to File an Amended Answer to the Amended Complaint Herein.

This matter coming on to be heard by the Commission upon the petition of counsel for respondents American Chain & Cable Company, Inc., and William D. Kirkpatrick, for leave to file an amended answer dated December 28, 1945 (annexed to the said petition), to the amended complaint herein, and the Commission having duly considered the said petition and the record herein, and being now fully advised in the premises:

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IT IS ORDERED that respondents' said petition that they be granted leave to file said amended answer, dated December 28, 1945, (annexed to said petition), be, and the same hereby is, granted.

By the Commission.

OTIS B. JOHNSON,
Secretary.

Issued January 14, 1946.

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Amended Answer of American Chain & Cable Company, Inc. and of William D. Kirkpatrick, Respondents, to the Amended Complaint.

Now come Respondents American Chain & Cable Company, Inc. and William D. Kirkpatrick, appearing herein by their attorney, Frederick S. Duncan, and, reserving all rights in respect to jurisdiction, misjoinder of complaints and counts in the proceeding, present this Amended Answer to the Amended Complaint filed in the above entitled proceeding as follows:

COUNT I

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(1) Answering the allegations of Paragraph One of Count I of the Amended Complaint, these Respondents deny that this proceeding is pursuant to the Federal Trade Commission Act; deny that the Commission has reason to believe, or that the fact is, that the Respondents or these Respondents have violated Section 5 of said Act; and deny that this proceeding is in the public interest.

(2) These Respondents severally deny each and every allegation of Paragraph Two of Count I of the Amended Complaint.

(3) These Respondents admit the allegations of sub-paragraphs (1), (2), (20) and (24) of Paragraph Three
294 of the Amended Complaint and that the Respondent Kirkpatrick was at one time President of the Chain Institute, Inc., but are without personal knowledge of the matters of facts set forth in Paragraphs 3 to 19 inclusive, and 23 and 25 to 27 inclusive of Paragraph Three of the Amended Complaint. As to sub-paragraph 21, these Respondents aver upon information and belief that Walter S. McCann died in the early Summer of 1945. Respondents deny all

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remaining allegations of Paragraph Three of the Amended Complaint.

(4) These Respondents admit that the descriptions of the several types of chain contained in Paragraph Four of the Amended Complaint and the statements concerning the production of the same are in the main substantially correct. Respondents also admit that welded chain, weldless chain and tire chains produced by the American Chain & Cable Company, Inc. are sometimes sold to wholesalers, dealers, and customers located in the United States of America at points other than in the States of origin of the shipments; but aver that in accordance with American's usual and customary practice such products are sold and delivered f.o.b. factory or warehouse either with or without freight allowances or other freight adjustments.

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These Respondents admit that prior to the adoption of the practices described in said Amended Complaint the Respondent American was and aver that it still is in substantial and active competition with other Respondent Members of the Chain Institute in making and seeking to make sales of chain products between and among the several States of the United States of America.

Except as herein specifically admitted these Respondents deny all allegations of Paragraph Four of said Amended Complaint.

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(5) Respondents deny the allegations contained in the two introductory sub-paragraphs of Paragraph Five of said Amended Complaint and further deny each and all of the allegations contained in sub-paragraphs 1 to 18 inclusive of said Paragraph Five.

298 *Amended Answer of American Chain & Cable Company, Inc., and of William D. Kirkpatrick, Respondents, to the Amended Complaint.*

(6) Respondent American admits that at certain periods it was the owner of, or had rights under, certain patents relating to Tire Chains, including Parsons Number 723,299 and Weed Number 768,495, and that it was engaged in extensive litigation thereunder; and that it later owned certain additional patents relating to reinforced tire chain under which licenses were granted to certain of the respondent corporations; that some of these licenses are still in force; that in these licenses Licensor reserved the right to prescribe the price at which the several licensees
299 would be permitted to sell products coming within the licensed patents; but further avers that in 1943, because of existing War conditions, it cancelled and surrendered all provisions and reservations contained in and rights given by said license agreements for prescribing prices at which the patented products might be sold by the licensees.

Except as herein specifically admitted each and all of the allegations of Paragraph Six of said Amended Complaint are hereby denied.

(7) These Respondents admit that from about 1937 to 1942 inclusive Respondents Shirley, Olcott & Nichols entered into certain agreements with the Procurement Divi-
300 sion of the United States Treasury Department regarding Tire Chains and that Respondent American supplied Tire Chains to Shirley, Olcott & Nichols that enabled said firm to supply and fill some orders placed with it in accordance with the provisions of the agreements with the Procurement Division aforesaid; but these Respondents deny that said arrangements, agreements and contracts were illegal or in violation of the statutes of the United States and not in any way to the disadvantage or loss of the United States

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Government or any of its agencies. These Respondents aver that all of the facts with respect to the relations between Shirley, Olcott & Nichols, American and its sublicensees were fully disclosed to and known by the United States Government and its said contracts and agreements with said Shirley, Olcott & Nichols were made and entered into by the Treasury Department, Procurement Division with full knowledge of all of the facts and with the approval of the United States Government as to the form and substance of such contracts; and because the same were recognized by the Government as beneficial to its several agencies. These Respondents further aver that such arrangements, agreements and contracts were proper and legal and to the advantage and benefits of said Government and its agencies and that the Government was put to no disadvantage or loss of any kind in making and carrying out the same.

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Except as hereinabove specifically admitted these Respondents deny all the allegations of Paragraph Seven of the Amended Complaint.

(8) Further answering in respect to Paragraph 6 and Paragraph 7 of the Amended Complaint these Respondents aver that in October 1942 they held conferences with the Procurement Division of the Treasury Department and with officials of the Federal Trade Commission and made a futile endeavor to bring about a joint consideration by the said Treasury Department and the Federal Trade Commission of questions raised by the Commission in respect to the propriety or legality of the said contracts issued by the Treasury Department, Procurement Division to Shirley, Olcott & Nichols. Thereupon Respondent American, with the knowledge of the Federal Trade Com-

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mission and prior to the preparation and filing of the Complaint herein terminated, by letter of October 15, 1942, the arrangements previously existing with Shirley, Olcott & Nichols. A copy of said letter was immediately thereafter given to the Federal Trade Commission. Thereafter no further contracts were entered into by American with Shirley, Olcott & Nichols for supplying them with tire chains and no further contracts for tire chains made by American were awarded to Shirley, Olcott & Nichols by the United States Government for any year subsequent
305 to 1942.

(9) These Respondents deny the allegations of Paragraph Eight of said Amended Complaint as therein stated; and aver that American uses various methods of quoting and selling its several chain products, including quoting f.o.b. factory or warehouse.

These Respondents deny that where American quotes and sells its chain products in other ways than merely quoting f.o.b. its place of production or warehouse such other practices are for the purpose of or have the result alleged in Paragraph Eight of said Amended Complaint.

These Respondents further aver that in no instance where American uses basing point, freight equalization or
306 other quoting and selling practices and systems, such practices and systems and any similarity in quoted prices that may exist between prices quoted by American and other Respondents are the result of any conspiracy or understanding with other respondents; but aver that it is the result of the desire of American to engage in competition with other manufacturers in various parts of the United States and to make its products widely available to the public at prices acceptable to the public that will permit

Respondent to continue in business with a reasonable profit.

(10) In answer to the allegations of Paragraphs 8, 9, 10 and 11 of the Amended Complaint these Respondents admit that in connection with the sale of American's various chain products including Welded Chain, Weldless Chain and Tire Chains, American uses several different quoting and selling methods. These include (a) quoting and selling at a price f.o.b. place of production or warehouse, with no freight allowance; (b) quoting and selling Welded Chain in accordance with what is familiarly known as the "Pittsburg Basis" method; Weldless Chain, by what is known as the "multiple basing points with freight equalization" method; and Tire Chains, by what is known as the "single zone, freight allowed to all points in the United States" method; as well as variations of such quoting and selling methods; but these Respondents deny that said methods are correctly described in the Amended Complaint and deny that American sells its chain products at delivered prices. 308

These Respondents deny that such practices were adopted or carried out by American as the result of any conspiracy, arrangement, agreement or cooperation with other manufacturing respondents or adopted and are being practiced for the purpose of hindering, suppressing and eliminating price competition or for any other purpose or with any such result as alleged in Paragraphs 8 to 11 inclusive of said Complaint. 309

These Respondents further deny that American has cooperatively employed with others for the purposes alleged in said Amended Complaint what is described in Paragraphs 8, 9, 10 and 11 thereof as basing point, freight equalization and zone pricing systems or practices.

310 *Amended Answer of American Chain & Cable Company, Inc., and of William D. Kirkpatrick, Respondents, to the Amended Complaint.*

They admit that Welded Chain, Weldless Chain and Tire Chains are sold f.o.b. shipping point with several types of freight factors and freight allowances; but deny that there was any mutual understanding agreement or combination to sell such products at any agreed price or in any particular manner.

Said Respondents further allege that the use of pricing methods involving quoting f.o.b. factory or warehouse but with freight factors from a single basing point, or multiple basing points with freight equalization, or with nation-
311 wide freight allowance, has been common in the Welded Chain, Weldless Chain and Tire Chains divisions of the chain industry respectively for upwards of thirty years and had not been the result of any combination or agreement, expressed or implied, between Respondents, but in each instance has been the natural development of basic economic conditions in such branch of the chain industry and has been the result of active competition between manufacturers of the several types of chain. These Respondents further aver that such systems of quoting and selling are consistent with free and open competition in the industry and do not result in and have not in any case of the chain industry resulted in monopolistic control over prices or in discriminatory treatment between customers nor do they
312 constitute unfair methods of competition. Respondents further aver that on the contrary said quoting and selling methods, using delivered prices, promotes competition in the chain industry and that the elimination of such pricing and distributing methods would result in establishing monopolies and monopolistic control by reason of geographic location of the several respondents' plants, thereby destroying competition and eliminating from the industry those manufacturers whose continuance in business is dependent upon their being able to sell chain products on the present price bases.

Amended Answer of American Chain & Cable Company, Inc., and of William D. Kirkpatrick, Respondents, to the Amended Complaint. 313

Except as herein expressly admitted, these Respondents deny each and every allegation of Paragraphs 8 to 11 inclusive of Count I of the Amended Complaint.

(11) The Respondent Kirkpatrick denies that he has participated in any cooperative and collective action with the Respondent, American Chain & Cable Company, Inc., or with any other respondent in performing or putting into operation or making effective any unlawful method, system, practice and policy as alleged in the several paragraphs of the Amended Complaint.

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(12) These Respondents deny each and every allegation of Paragraphs 12 and 13 of Count I of the Amended Complaint.

COUNT II

(13) Answering the allegations of Paragraph One, Count II, of the Amended Complaint these Respondents deny that this proceeding is pursuant to the Clayton Act; deny that the Commission has reason to believe, or that the fact is, that the Respondents or these Respondents have violated or are violating the provisions of said Act as amended, and deny that this proceeding is in the public interest.

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(14) These Respondents deny the charges contained in Paragraph Two of Count II of the Amended Complaint.

(15) Answering the allegations of Paragraphs Three and Four of Count II of the Amended Complaint, these Respondents refer to the allegations of Paragraphs Three and Four of their Amended Answer to Count I hereof and adopt and repeat same in so far as the same are applicable

316 *Amended Answer of American Chain & Cable Company, Inc., and of William D. Kirkpatrick, Respondents, to the Amended Complaint.*

as their answer to the allegations of Paragraphs Three and Four of Count II of said Amended Complaint.

(16) These Respondents deny each and every allegation of Paragraphs Five, Six, Seven, Eight, Nine, Ten, Eleven and Twelve of Count II of the Amended Complaint.

(17) These Respondents further allege that the matters of quoting and selling on the basis of freight factors from a Single Basing Point or from multiple Basing Points with freight equalization, or sale f.o.b. factory with nation-wide
317 freight allowance, as set forth in Count I and in Count II of the Amended Complaint, involve solely economic problems and do not involve questions of unfair trade practices and are not within the jurisdiction of the Federal Trade Commission or Section 5, or other sections of the Trade Commission Act as amended.

These Respondents further allege that in so far as the Amended Complaint relies upon the charges of conspiracy by and between these Respondents and others, the Federal Trade Commission is without jurisdiction under the Federal Trade Commission Act or otherwise to try such issues.

Wherefore, these Respondents pray that the Amended Complaint herein be dismissed and an order to such effect
318 be duly entered.

Dated at New York, December 28, 1945.

American Chain & Cable Company, Inc., and
William D. Kirkpatrick, Respondents,

By Frederick S. Duncan,
Their Attorney.

(Filed December 29, 1945.)

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Answer of The Bridgeport Chain and Manufacturing Company; Cleveland Chain & Manufacturing Company; Round California Chain Company; and Seattle Chain & Mfg. Company.

Come now respondents The Bridgeport Chain & Manufacturing Company, Cleveland Chain & Manufacturing Company, Round California Chain Company, and Seattle Chain & Mfg. Company, by Feldman, Kittelle, Campbell & Ewing, their attorneys, and for answer to the amended complaint in the above-entitled proceeding, say:

PARAGRAPH ONE: Paragraph One of said complaint, and each and every allegation thereof, is denied.

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PARAGRAPH TWO: Paragraph Two of said complaint, and each and every allegation thereof, is denied.

PARAGRAPH THREE: Subparagraphs (1), (3), (9), (14), (16), (20), and (21) of Paragraph Three of said complaint are admitted.

These respondents are without knowledge or information concerning the allegations contained in the other numbered subparagraphs of said Paragraph Three, and therefore deny the same.

These respondents admit that they are members of respondent Chain Institute, Inc.

Except as herein otherwise expressly set forth, Paragraph Three of said complaint, and each and every allegation thereof, is denied. 321

PARAGRAPH FOUR: Respondents admit the allegations contained in the first five unnumbered subparagraphs of Paragraph Four of said complaint.

Respondents are without knowledge or information concerning the allegations contained in the sixth unnumbered

subparagraph of said Paragraph Four, and therefore deny the same.

Respondents admit that they sell in "commerce" as "commerce" is defined in the Federal Trade Commission Act, and that they are in active and substantial competition with the other respondents in this proceeding and with other members of the chain industry; and these four answering respondents allege that they are affiliated with each other through a common source of ownership of a
323 controlling interest in their respective outstanding shares of stock.

Except as herein otherwise expressly set forth, Paragraph Four of said complaint, and each and every allegation thereof, is denied.

PARAGRAPH FIVE: Paragraph Five of said complaint, and each and every allegation thereof, is denied.

PARAGRAPH SIX: Respondents are without knowledge or information concerning the allegations contained in Paragraph Six of said complaint, and therefore deny the same and each and every allegation thereof.

324 PARAGRAPH SEVEN: Respondents are without knowledge or information concerning the allegations contained in Paragraph Seven of said complaint, and therefore deny the same and each and every allegation thereof.

PARAGRAPH EIGHT: Paragraph Eight of said complaint, and each and every allegation thereof, is denied.

Answer of The Bridgeport Chain and Manufacturing Company; Cleveland Chain & Manufacturing Company; Round California Chain Company; and Seattle Chain & Mfg. Company.

PARAGRAPH NINE: Each of these answering respondents quotes and sells Welded Chain at delivered prices calculated by adding to f.o.b. shipping point prices the freight from Pittsburgh, Pennsylvania, to the destination of the particular shipment. 325

Except as herein otherwise expressly set forth, Paragraph Nine of said complaint, and each and every allegation thereof, is denied.

PARAGRAPH TEN: Each of these answering respondents quotes and sells Weldless Chain at delivered prices calculated by adding to f.o.b. shipping point prices the freight from a basing point to the destination of the shipment, the particular basing point selected in each transaction being that which is closest freightwise to such destination. The basing points are points at which Weldless Chain is manufactured. 326

Except as herein otherwise expressly set forth, Paragraph Ten, and each and every allegation thereof, is denied.

PARAGRAPH ELEVEN: Each of these answering respondents quotes and sells Tire Chains at prices which are f.o.b. delivered at purchaser's destination, with freight from shipping point to destination either prepaid or allowed, the delivered prices quoted and charged by a particular answering respondent for a particular type, style and size of Tire Chain being the same at all destination points in the United States. 327

Except as herein otherwise expressly set forth, Paragraph Eleven of said complaint, and each and every allegation thereof, is denied.

328 *Answer of The Bridgeport Chain and Manufacturing Company; Cleveland Chain & Manufacturing Company; Round California Chain Company; and Seattle Chain & Mfg. Company.*

PARAGRAPH TWELVE: Paragraph Twelve of said complaint, and each and every allegation thereof, is denied.

PARAGRAPH THIRTEEN: Paragraph Thirteen of said complaint, and each and every allegation thereof, is denied.

COUNT II

PARAGRAPH ONE: Paragraph One of Count II of the com-
329 plaint and each and every allegation thereof is denied.

PARAGRAPH TWO: Paragraph Two of Count II of the complaint and each and every allegation thereof is denied.

PARAGRAPHS THREE AND FOUR: Each of these respondents as and for an answer to Paragraphs Three and Four to Count II of the amended complaint incorporate the answers they have made to Paragraphs Three and Four inclusive of Count I to precisely the same extent and effect as if each and all of them were set forth in full and repeated verbatim in this Count II.

PARAGRAPH FIVE: Paragraph Five of Count II and each
330 and every allegation thereof is denied.

PARAGRAPH SIX: Paragraph Six of Count II and each and every allegation thereof is denied.

PARAGRAPH SEVEN: Paragraph Seven of Count II and each and every allegation thereof is denied.

PARAGRAPH EIGHT: Paragraph Eight of Count II and each and every allegation thereof is denied.

Answer of The Bridgeport Chain and Manufacturing Company; Cleveland Chain & Manufacturing Company; Round California Chain Company; and Seattle Chain & Mfg. Company.

PARAGRAPH NINE: Paragraph Nine of Count II and each and every allegation thereof is denied.

PARAGRAPH TEN: Paragraph Ten of Count II and each and every allegation thereof is denied.

PARAGRAPH ELEVEN: Paragraph Eleven of Count II and each and every allegation thereof is denied.

PARAGRAPH TWELVE: Paragraph Twelve of Count II and each and every allegation thereof is denied.

WHEREFORE, having fully answered, said respondents pray that said complaint be dismissed.

Dated, November 27, 1945.
Washington, D. C.

THE BRIDGEPORT CHAIN & MANUFACTURING COMPANY,
CLEVELAND CHAIN & MANUFACTURING COMPANY,
ROUND CALIFORNIA CHAIN COMPANY,
SEATTLE CHAIN & MFG. COMPANY,

By GEORGE F. HURLEY,
of FELDMAN, KITTELLE, CAMPBELL & EWING,
1044 Shoreham Building,
15th & H Streets, N. W.,
Washington 5, D. C.,
Attorneys for said Respondents.

Filed November 28, 1945.

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Answer of The McKay Company and Frank A. Bond.

Come now the respondents, The McKay Company and Frank A. Bond, by their attorneys, and answer the above-entitled Complaint as follows:

COUNT I

PARAGRAPH ONE

Denied.

PARAGRAPH TWO

Denied.

PARAGRAPH THREE

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Subparagraph (1). Admitted.

Subparagraph (4). Admitted.

Subparagraph (20). Admitted.

Subparagraph (22). Admitted.

Subparagraph (23). Denied that Frank A. Bond is an official of the Institute in dealing with freight rate matters. All other allegations of said subparagraph are admitted.

Subparagraph (24). Admitted.

These respondents are without knowledge as to the truth or falsity of the allegations contained in subparagraphs (2), (3), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14),
336 (15), (16), (17), (18), (19), (21), (25), (26), (27), and therefore deny the same.

These respondents admit that the McKay Company is a member of Chain Institute, Inc.

All other allegations contained in Paragraph Three are denied.

PARAGRAPH FOUR

Subparagraph (1) (unnumbered). Admitted.

Subparagraph (2) (unnumbered). Admitted.

Subparagraph (3) (unnumbered). Admitted.

Subparagraph (4) (unnumbered). Admitted.

Subparagraph (5) (unnumbered). Admitted.

Subparagraph (6) (unnumbered). Admitted, except that these respondents deny that they have in any manner misused any patent monopoly; and they deny that the facts alleged or referred to in said subparagraph have any relevancy and materiality as stated in the last sentence 338 thereof.

Subparagraph (7) (unnumbered). Admitted.

Subparagraph (8) (unnumbered). Denied. These respondents allege that the respondent The McKay Company is now and during the time mentioned in the Complaint and prior thereto was engaged in business in competition with the other respondents who are members of the Institute and with others.

PARAGRAPH FIVE

Denied.

PARAGRAPH SIX 339

Subparagraph (1) (unnumbered). Denied that following the expiration in 1921 of the patents therein described, respondent American continued to be recognized and accepted by its competitors through mutual understanding as the price leader in the industry. The other allegations of said subparagraph are admitted.

Subparagraph (2) (unnumbered). Admitted.

Subparagraph (3) (unnumbered). Admitted.

Subparagraph (4) (unnumbered). Admitted that respondent American and respondent McKay settled the patent suit instituted by American, by agreement in September 1935. All other allegations of this subparagraph are denied.

Subparagraph (5) (unnumbered). These respondents admit that respondents McKay and American on September 26, 1935, entered into certain written agreements, and that such agreements were terminated by virtue of written notice given by respondent McKay on February 6, 1939. The other allegations of said subparagraph are denied.

Subparagraph (6) (unnumbered). These respondents admit that on October 7, 1935, the respondents American, Pyrene and Hodell (then trading under the name and style of Chain Products Company) executed written agreements similar in form and substance to the agreements which were executed by respondent American and respondent McKay on September 26, 1935. These respondents allege that they are without knowledge as to the other allegations contained in said subparagraph.

Subparagraph (7) (unnumbered). Denied.

Subparagraph (8) (unnumbered). Denied.

Subparagraph (9) (unnumbered). Denied.

Subparagraph (10) (unnumbered). Denied.

PARAGRAPH SEVEN

Denied.

PARAGRAPH EIGHT

Denied.

PARAGRAPH NINE

These respondents allege that in selling welded chain The McKay Company usually charges a base price plus a sum equal to the freight rate in effect at the time of sale from Pittsburgh, Pennsylvania, to destination; that in selling welded chain said respondent allows to the purchaser credit for the actual freight (to be paid to the carrier by the purchaser) from the shipping point to destination, so that the actual delivered cost to the purchaser is the base price plus a sum equal to the freight rate from Pittsburgh, Pennsylvania, to destination.

These respondents further allege that the business of 344
The McKay Company originated prior to 1885 at Pittsburgh, Pennsylvania, where it has continuously maintained a large plant; that in 1919 it acquired plants at Columbus and Marietta, Ohio, and Huntington, West Virginia; that in 1920 it built a plant at York, Pennsylvania, and thereafter discontinued the Columbus, Marietta and Huntington plants; that from the beginning of its business history to the present time it has sold its welded chain at the pricing system above described; and that said respondent has used the said system of pricing in connection with its sales of welded chain without any mutual understanding, agreement or combination with any other person or persons whomsoever.

Except as hereinabove set forth, these respondents deny 345
each and every allegation of said paragraph.

PARAGRAPH TEN

These respondents allege that the principal places in the United States where weldless chain is manufactured are York, Pennsylvania, Cleveland, Ohio, Cincinnati, Ohio,

and Bridgeport, Connecticut; that in selling weldless chain The McKay Company usually charges a base price plus a sum equal to the freight rate in effect at the time of sale from that one of the above-named four points which is nearest freightwise to destination; and that in selling weldless chain said respondent allows the purchaser credit for the actual freight (to be paid to the carrier by the purchaser) from the shipping point to destination.

These respondents further allege that The McKay Company did not commence the manufacture of weldless chain until 1921, when it began such manufacture at its York plant; that at said time, the above-described system of
347 pricing prevailed throughout the weldless chain industry; that from said date to the present time it has sold weldless chain at the pricing system above described; and that said respondent has used the said system of pricing in connection with its sales of weldless chain without any mutual understanding, agreement or combination with any other person or persons whomsoever.

Except as hereinabove set forth these respondents deny each and every allegation of said paragraph.

PARAGRAPH ELEVEN

These respondents allege that The McKay Company, on orders for 24 pairs or more of passenger car chains or
348 the equivalent, usually charges a delivered price uniform throughout the United States and allows to the purchaser credit for the actual freight (to be paid to the carrier by the purchaser) from the shipping point to his regularly established place of business; except that on orders for less than 24 pairs of passenger car chains, or the equivalent, no freight is allowed, the purchaser paying and absorbing the same.

These respondents further allege that when the so-called Weed patents expired on August 23, 1921, The McKay Company began to manufacture tire chains at its plant at York, Pennsylvania; that at said time the above-described system of pricing (excepting for a variation in the quantity on which freight was allowed) prevailed throughout the tire chain industry; that from said date to the present time it has sold tire chains at the pricing system above described (excepting for a variation in the quantity on which freight was allowed); and that said respondent has used the said pricing system in connection with its sales of tire chains without any mutual understanding, agreement or combination with any other person or persons whomsoever. 350

Except as hereinabove set forth these respondents deny each and every allegation of said paragraph.

PARAGRAPH TWELVE

Denied.

PARAGRAPH THIRTEEN

Denied.

COUNT II

PARAGRAPH ONE

Denied. 351

PARAGRAPH TWO

Denied.

PARAGRAPH THREE

Respondents make the same answer to this paragraph that they do to Paragraph Three of Count I; and their answer to said paragraph is adopted verbatim as their answer to Paragraph Three of Count II.

PARAGRAPH FOUR

Respondents make the same answer to this paragraph that they do to Paragraph Four of Count I; and their answer to said paragraph is adopted verbatim as their answer to Paragraph Four of Count II.

PARAGRAPH FIVE

Denied.

PARAGRAPHS SIX, SEVEN AND EIGHT

353 Respondents aver that the respondent, The McKay Company, uses the pricing system described in their answer to Paragraphs Nine, Ten and Eleven of Count I, but deny that such pricing system is improperly discriminatory or that it is unlawful in any respect. To the extent that they are inconsistent with the foregoing statements, the allegations of Paragraphs Six, Seven and Eight of Count II are denied.

PARAGRAPH NINE

Denied.

PARAGRAPH TEN.

Denied.

PARAGRAPH ELEVEN

354 Denied.

PARAGRAPH TWELVE

Denied.

GENERAL DENIAL

These respondents deny each and every allegation of Counts I and II of the Amended Complaint which are not hereinabove specifically admitted, qualified or denied.

WHEREFORE, having fully answered the Complaint herein, these respondents pray that the same be dismissed.

Dated, November 19, 1945.

REED, SMITH, SHAW & MCCLAY,
By CHARLES DENBY,
747 Union Trust Building,
Pittsburgh, Pennsylvania,

ALVORD & ALVORD,
By FLOYD F. TOOMEY,
Munsey Building,
Washington, D. C., 356
Attorneys for The McKay Company
and Frank A. Bond.

Filed November 21, 1945.

Answer of Respondent Pyrene Manufacturing Company.

I.

The Respondent, Pyrene Manufacturing Company, by Chadbourne, Hunt, Jaeckel & Brown, its attorneys, makes the following answer to Count I of the amended complaint of the Federal Trade Commission dated the 9th day of October, A. D. 1945: 357

1. This Respondent denies each and every one of the allegations contained in Paragraphs One, Two, Five, Seven, Eight, Eleven, Twelve and Thirteen of Count I of the amended complaint.

2. This Respondent denies any knowledge or information sufficient to form a belief with respect to the allegations

358 *Answer of Respondent Pyrene Manufacturing Company.*

contained in subdivisions numbered 1 to 27, inclusive, of Paragraph Three of Count 1 of the amended complaint, except that it admits the allegations contained in subdivision 5 of said Paragraph Three; and this Respondent denies each and every one of the other allegations contained in Paragraph Three, except that it admits that it is a member of the Respondent Chain Institute, Inc.

3. This Respondent denies any knowledge or information sufficient to form a belief with respect to the allegations contained in Paragraphs Four, Nine and Ten of Count 1 of the amended complaint.

359 4. This Respondent denies any knowledge or information sufficient to form a belief with respect to the allegations contained in Paragraph Six of Count 1 of the amended complaint, except that it admits that it executed a written agreement on or about October 7, 1935, with the Respondent American Chain & Cable Company, Inc., which has from time to time been amended, but denies any knowledge or information sufficient to form a belief as to whether such written agreement as amended is similar in form and substance to the agreements referred to in said Paragraph Six of the amended complaint, and this Respondent denies the use of any such agreement as a subterfuge or device as alleged in said Paragraph Six of the amended complaint.

360 5. This Respondent specifically denies that it manufactures, sells or otherwise deals in welded or weldless chain and therefore denies any knowledge or information sufficient to form a belief with respect to all of the allegations of Count 1 of the amended complaint relating to welded or weldless chain, or the activities of the Respondents in the sale and distribution thereof in commerce.

AS A FIRST AFFIRMATIVE AND COMPLETE DEFENSE TO THE ALLEGATIONS CONTAINED IN COUNT I OF THE AMENDED COMPLAINT.

6. This Respondent alleges that the Federal Trade Commission in its allegations contained in Paragraph Two of Count I of the amended complaint has set forth a cause of action under Section 1 of the Sherman Act (15 U. S. Code, Ann., Sect. 1) enforceable only by The Attorney General of the United States and that the Federal Trade Commission does not have jurisdiction over the subject matter so alleged and accordingly is without power to proceed against this Respondent with respect to such subject matter under Section 5 of the Federal Trade Commission Act (15 U. S. C. A. Sect. 41). 362

II.

The Respondent, Pyrene Manufacturing Company, by Chadbourne, Hunt, Jaeckel & Brown, its attorneys, makes the following answer to Count II of the amended complaint of the Federal Trade Commission dated the 9th day of October, A. D. 1945:

7. This Respondent denies each and every one of the allegations contained in Paragraphs One, Two, Three, Four, Five, Six, Seven, Eight, Nine, Ten, Eleven and Twelve of Count II of the amended complaint. 363

AS A FIRST AFFIRMATIVE AND COMPLETE DEFENSE TO THE ALLEGATIONS CONTAINED IN COUNT II OF THE AMENDED COMPLAINT.

8. This Respondent alleges that the prices quoted by it and the furnishing of the services or facilities alleged in Count II of the amended complaint to its purchasers

was made in good faith to meet an equally low price of its competitors and the services or facilities furnished by its competitors, respectively.

AS A SECOND AFFIRMATIVE AND COMPLETE DEFENSE TO THE ALLEGATIONS CONTAINED IN COUNT II OF THE AMENDED COMPLAINT.

9. This Respondent alleges that the Federal Trade Commission is without power and authority to proceed against this Respondent under the Act of Congress approved June 19, 1936, Public 692 (generally referred
365 to as the Robinson-Patman Act), amending Section 2 of the Act of Congress approved October 15, 1914 (generally referred to as the Clayton Act), inasmuch as:

(a) Said Section 2, as amended by the Act approved June 19, 1936, is unconstitutional and void and beyond the scope of the power conferred on Congress by Section 8 of Article I of the Constitution of the United States to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes;

(b) Said Section 2, as so amended, is unconstitutional and void inasmuch as it violates the Tenth Amendment to said Constitution in that it purports (i) to regulate the sale of goods wholly within the
366 confines of the several states, (ii) to make unlawful discriminations in price as therein set forth wherein the competition involved includes competition wholly within the confines of the several states, and (iii) to make unlawful the furnishing to purchasers of services and/or facilities and the payment to purchasers for services and/or facilities furnished by them in connection with the processing, handling, sale and offering for sale of goods in commerce wholly within the con-

fines of the several states and wherein the competition involved includes competition wholly within the confines of the several states;

(c) Said Section 2, as so amended, is unconstitutional and void as it regulates the purchase and sale of commodities and fixes the prices thereof sold in commerce, whether among the several states or wholly within the confines of a single state, and as it regulates and prescribes the terms and conditions under which services or facilities may be furnished to purchasers and payments may be made to purchasers for services and facilities furnished by them in connection with the processing, handling, offering for sale and 368
sale of commodities in commerce, whether among the several states or wholly within the confines of a single state, and as it imposes other restrictions thereon having no relation to interstate commerce, all of which are beyond the scope of the powers vested in Congress under Section 8 of Article I of the Constitution of the United States and in violation of the Tenth Amendment to said Constitution and in denial of due process of law guaranteed by the Fifth Amendment to said Constitution;

(d) Said Section 2, as so amended, is unconstitutional and void in that it forbids the doing of acts in terms so uncertain, vague and indefinite that it fails to inform with respect to what is unlawful and is, there- 369
fore, in denial of the due process of law guaranteed by the Fifth Amendment to the Constitution of the United States;

(e) Said Section 2, as so amended, is unconstitutional and void in that Congress has therein and thereby attempted to delegate its legislative power to administrative officials in violation of Section 1 of Article I of the Constitution of the United States.

370 *Answer of Respondent Pyrene Manufacturing Company.*

III.

The Respondent, Pyrene Manufacturing Company, by Chadbourne, Hunt, Jaeckel & Brown, its attorneys, notwithstanding the answer hereinbefore set forth, reserves all rights with respect to the misjoinder of respondents and/or the misjoinder of allegations, counts, causes of action and complaints in this proceeding.

WHEREFORE, the Respondent Pyrene Manufacturing Company, having fully answered the amended complaint herein, prays that said amended complaint and Counts I and II therein set forth against it be dismissed.

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PYRENE MANUFACTURING COMPANY,
By CHADBOURNE, HUNT, JAECKEL & BROWN,
Its Attorneys,
Office and Post Office Address,
70 Pine Street,
Borough of Manhattan,
City of New York.

Dated: November 26, 1945.

(Filed November 28, 1945.)

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Answer of Hodell Chain Company to Amended Complaint.

Comes now the Respondent, Hodell Chain Company, and reserving all rights with respect to jurisdiction, misjoinder of respondents, and misjoinder of complaints and counts in this proceeding, answers the complaint of the Federal Trade Commission in the above entitled matter as follows:

PARAGRAPH ONE. Respondent denies that this proceeding is pursuant to the Federal Trade Commission Act; denies that the Commission has reason to believe, or that the fact is, that the Respondents, or this Respondent, have violated Section 5 of said Act; and denies that this proceeding is in the public interest. 374

PARAGRAPH TWO. Without admitting the truth or accuracy thereof, but on the contrary denying the same as hereinafter appears, this Respondent recognizes that the charges alleged in the complaint therein are generally described in Paragraph Two.

PARAGRAPH THREE. (1). Respondent admits that Chain Institute, Inc., is a trade association, incorporated under the laws of the State of Delaware, with its principal office in Chicago, Illinois.

(2) Respondent admits that American Chain and Cable Company, Inc. is a corporation, incorporated under the laws of the State of New York, with offices at Bridgeport, Connecticut; and at 230 Park Avenue, New York City; and a plant and office at York, Pennsylvania, but Respondent is without knowledge as to which is its principal office. 375

(3) Respondent admits that Bridgeport Chain and Manufacturing Company is a corporation, with an office at Bridgeport, Connecticut, but is without knowledge as to state of incorporation or location of its principal office.

(4) Respondent admits that the McKay Company is a corporation, but is without knowledge as to state of incorporation or location of its principal office.

(5) Respondent admits that Pyrene Manufacturing Company is a corporation, but is without knowledge as to state of incorporation or location of its principal office.

(6) Respondent admits that it is a corporation, organized and existing under the laws of the State of Ohio, with its principal office located at 3924 Cooper Avenue, Cleveland, Ohio, and admits that it was organized in 1893 and until July 1, 1936, traded under the name and title 377 "Chain Products Company".

(7) Respondent admits that St. Pierre Chain Corporation is a corporation, with an office in Worcester, Massachusetts, but is without knowledge as to state of incorporation or location of its principal office.

(8) Respondent admits that S. G. Taylor Chain Company is a corporation, with an office in Hammond, Indiana, but is without knowledge as to state of incorporation or location of its principal office.

(9) Respondent admits that Cleveland Chain and Manufacturing Company is a corporation, organized and existing under the laws of the State of Ohio, with its principal office 378 located at Broadway and Henry Streets, Garfield Heights, Cleveland, Ohio.

(10) Respondent admits that Columbus McKinnon Chain Corporation is a corporation, with an office at Tonawanda, New York, but is without knowledge as to state of incorporation or location of its principal office.

(11) Respondent admits that International Chain and Manufacturing Company is a corporation, with an office in York, Pennsylvania, but is without knowledge as to state of incorporation or location of its principal office.

(12) Respondent admits that Nixdorff-Krein Manufacturing Company is a corporation, with an office in St. Louis, Missouri, but is without knowledge as to state of incorporation or location of its principal office.

(13) Respondent admits that Peerless Chain Company is a corporation, with an office in Winona, Minnesota, but is without knowledge as to state of incorporation or location of its principal office. 380

(14) Respondent admits that Round California Chain Company is a corporation, with an office in South San Francisco, California, but is without knowledge as to state of incorporation or location of its principal office.

(15) Respondent admits that J. M. Russell Manufacturing Company is a corporation, with an office at Naugatuck, Connecticut, but is without knowledge as to state of incorporation or location of its principal office.

(16) Respondent admits that Seattle Chain and Manufacturing Company is a corporation, with an office at Seattle, Washington, but is without knowledge as to state of incorporation or location of its principal office. 381

(17) Respondent admits that Turner and Seymour Manufacturing Company is a corporation, with an office in Torrington, Connecticut, but is without knowledge as to state of incorporation or location of its principal office.

(18) Respondent admits that Western Chain Products Company is a corporation, with an office in Chicago, Illinois.

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but is without knowledge as to state of incorporation or location of its principal office.

(19) Respondent admits that Woodhouse Chain Works is a corporation, with an office in Trenton, New Jersey, but is without knowledge as to state of incorporation or location of its principal office.

(20) Respondent is informed and believes that Dennis A. Merriman is Managing Director of Chain Institute, Inc., with an office located at 208 South LaSalle Street, Chicago, Illinois, but not being a member of Chain Institute, Inc., is without knowledge.

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(21) Respondent is informed and believes that Walter S. McCann is Secretary and Treasurer of Chain Institute, Inc., with an office at 208 South LaSalle Street, Chicago, Illinois, but not being a member of Chain Institute, Inc. is without knowledge.

(22) Respondent is informed and believes that Wm. D. Kirkpatrick is Vice President of American Chain and Cable Company, Inc., and President of Chain Institute, Inc., with an office in York, Pennsylvania, but not being a member of Chain Institute, Inc., is without knowledge.

(23) Respondent is informed and believes Frank A. Bond is Executive Vice President and Secretary of the McKay Company, with an office in Pittsburgh, Pennsylvania, but is without knowledge as to whether he is an official of Chain Institute, Inc., in dealing with freight rate matters.

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(24) Respondent is informed and believes George J. Campbell, Jr. is President of International Chain and Manufacturing Company and Vice President of Chain Institute, Inc., with offices in York, Pennsylvania.

(25) Respondent admits that Alfred Peter Shirley is a partner in the firm of Shirley, Olcott and Nichols, with offices in the Mills Building, Washington, D. C., but is without knowledge as to his residence.

(26) Respondent admits that Floyd B. Olcott is a partner in the firm of Shirley, Olcott and Nichols, with offices in the Mills Building, Washington, D. C., but is without knowledge as to his residence.

(27) Respondent admits that Forrest C. Nichols is a partner in the firm of Shirley, Olcott and Nichols, with offices in the Mills Building, Washington, D. C., but is 386
without knowledge as to his residence.

Respondent denies that each of the Respondents described in Paragraph Three, Subparagraphs (2) to (19), inclusive, is a member of Chain Institute, Inc.; denies that this Respondent has directly participated in any cooperative and collective action in the formation, putting into operation and making effective the methods, systems, practices and policies alleged in the complaint to be unlawful.

Respondent denies that it has participated in any cooperative or collective action, with others named as Respondents herein, in the formation, putting into operation or making effective the methods, systems, practices and policies alleged in the complaint to be unlawful. 387

Except as hereinabove set forth, this Respondent denies each and every allegation of Paragraph Three.

PARAGRAPH FOUR. Respondent admits that the complaint refers to various types of steel, alloyed steel and other metallic chain and chain parts, including Welded Chain, Weldless Chain and Tire Chain.

Respondent admits that Welded Chain derives its designation from the fact that the process of welding is used in the manufacture thereof; that such chain is manufactured in various sizes and weights and for many uses, including the uses described in the complaint herein.

Respondent admits that the process of electric welding has been substantially used in the production of Welded Chain; that such chain represents a substantial part of the tonnage of the industry; that such chain is also referred to as Commercial Chain and Pound Chain; that it is usually sold on a per pound basis.

389 Respondent admits that Weldless Chain is made by bending chain wire into the form of links without the use of the welding process; that such chain is generally light in weight and generally used where the stronger Welded Chain is not required.

Respondent admits that the welding process is generally used in the manufacture of Tire Chains, which are composed of two chains connected by cross chains spaced at equal distances, for attachment to the wheels of motor equipment.

Respondent has been informed that Welded and Weldless Chain are not patented articles; that many, perhaps practically all, of the chain manufacturers, have produced and sold Tire Chains for a substantial number of years, but
390 Respondent is unable to state for how many years. Respondent admits that American Chain and Cable Company, Inc., and the McKay Company have heretofore acquired patents on improvements in making Tire Chains, but is without knowledge as to the time thereof; that such patents relate to the reinforcement of the tread links and the cross chains.

Respondent admits that it manufactures, sells and distributes Welded Chain, Weldless Chain and Tire Chains

at various points in the United States, in the normal channels of distril tion, and to the United States Government: that it ships its products to its purchasers at poir in several states of the United States and the District of Columbia, other than Ohio, as well as in the State of Ohio.

Respondent admits that it has been at all times and now is in active and substantial competition with the members of the chain industry; that this competition has been and now is interstate in nature. Respondent denies that such competition has ever been or now is other than active and substantial competition.

Except as hereinabove set forth, this Respondent is without knowledge with respect to the allegations of Paragraph Four, and denies each and every one. 392

PARAGRAPH FIVE. Respondent denies that for more than eight years last past, or at any time, it has maintained and now has in effect, or has assisted in so doing, an unlawful combination between itself and the other Respondents named in the complaint, or any other person or persons, to hinder, frustrate, suppress and eliminate competition as alleged.

Respondent denies that it has done and performed, either jointly or singly, any of the following acts and things:

(1) That it has, with anybody or by any means, on any occasion, entered into, engaged in or carried out understandings and agreements for the purpose and with the effect of substantially or otherwise hindering, frustrating, suppressing and eliminating actual and potential competition as to price and otherwise in the sale and distribution of Welded Chain, Weldless Chain and Tire Chain in interstate commerce. 393

(2) That it organized, operated, and now operates, or at any time assisted in so doing, Chain Institute, Inc., to promote and serve the mutual interests of the Respondent Members; denies that this Respondent uses said Institute as an instrument or vehicle for any joint and cooperative purpose and action in hindering, frustrating, suppressing and eliminating competition in price and otherwise in the sale and distribution of chain and chain products in interstate commerce.

(3) That it employed Respondent, Merriman, on or about August 1, 1938, to serve it, and others, as a common
395 agent to make more effective any suppression of price competition, and that said Merriman has since August 1, 1938, served this Respondent and others as a common agent in the suppression of price competition and "stabilization of prices in the industry". This Respondent is without knowledge as to the correspondence alleged in this Subparagraph (3) of Paragraph Five.

(4) That this Respondent agreed to fix and maintain, and has fixed, maintained and made effective, identical delivered prices, quotations, terms and conditions of sale, for chain and chain products in the United States, to dealers and distributors thereof, and to other purchasers thereof, including the Procurement Division of the United States Treasury Department and other Governmental
396 agencies.

(5) That this Respondent has adopted and continued in effect by agreement, understanding and concerted action, with others, price fixing formulae whereby identical delivered prices, quotations and identical delivered costs for the sale of chain and chain products are fixed and maintained.

(6) That it has agreed to adopt and has adopted and maintained systems of delivered price quotations and delivered costs, designed to prevent and which do prevent reflection in such quotations and costs of any of the differences of costs of raw materials, other items, or freight delivery from their respective places of manufacture to the places of business of the intending purchasers of chain and chain products, but on the contrary, alleges that it has followed the methods of marketing prevailing in the trade, which methods have evolved over a long period of years, as the natural result of the development of the business.

(7) That it cooperatively and collectively makes and announces price quotations in such a way that the delivered cost of its product to a purchaser is matched and made identically the same as said costs of its competitors. 398

(8) That it has cooperatively promoted adherence and does now cooperatively promote adherence to delivered prices announced by any person, under any system, in the sale of Welded Chain; that it makes any prices effective and accepted other than its own prices; that it obviates and precludes the exercise of independent and competitive will, judgment and action with regard to prices and price policies, in any manner whatsoever.

(9) That it, by agreement, has adopted and used a price leadership plan whereby American Chain and Cable Company, Inc. leads in the announcement and publication of price increases and decreases as a part thereof, or that it now does so. 399

(10) That it has unlawfully communicated, filed and exchanged information concerning prices which have been quoted and charged by it or others, or information concerning future prices and price quotations by it, or others.

(11) That it agreed to hold or did hold from time to time any meeting under the auspices and supervision of Chain Institute, Inc., its officers, employees and agents, or on other occasion, during which the latter cooperated with and assisted this Respondent in furthering or carrying out any unlawful acts, practices and methods.

(12) That either Respondent Merriman, or any other official or agent of Chain Institute, Inc., have unlawfully communicated and discussed past, current and future prices and price quotations with this Respondent, or advised, instructed and pressed this Respondent with regard to
401 what price quotations should be made on chain and chain products.

(13) That, with the assistance of Respondent Merriman, it agreed to adopt and has adopted and maintained a uniform method of determining the basic and additional discounts and the amount thereof, to be granted by the Respondent Members of Chain Institute, Inc., to the purchasers of their chain and chain products.

(14) That it has agreed to increase and decrease, and has simultaneously increased and at other times decreased the basic discounts and the amounts thereof at which this Respondent sells chain and chain products.

402 (15) That it has agreed with competitors to enter into or has entered into written "jobbers' sales agreements" and "dealers' agreements", under which jobbers and dealers were required to maintain the resale prices prescribed by the members of Chain Institute, Inc.

(16) That it has agreed with the members of Chain Institute, Inc. to adopt or has adopted and maintained a classification of purchasers of chain and chain products,

including Tire Chains, for the purpose of aiding members of Chain Institute, Inc. in establishing arbitrary "channels of distribution" or in establishing arbitrary and particular levels of discounts for various customers.

(17) That it fraudulently, with the cooperation and assistance of any other person, secured from officials of the Procurement Division of the United States Treasury Department, approval of certain specifications of Tire Chains for the purpose and with the effect of eliminating competitors and price competition in the submission of bids on Tire Chains to the Federal Government.

(18) That prior to, or during 1943, or thereafter, it acted 404
to obstruct production and sales of chain by persons and firms not under control of Respondents; that it has interfered with production of chain contracted for use in the war effort.

Except as hereinabove set forth, this Respondent denies each and every allegation of Paragraph Five.

PARAGRAPH SIX. This Respondent is without knowledge as to whether American Chain and Cable Company, Inc. was the original manufacturer of Tire Chains in this country, whether it enjoyed a patent monopoly until about 1921 with respect thereto, and whether it has been the dominating factor in the Tire Chain business either before or after 1921. This Respondent admits that various chain 405
companies have manufactured and sold Tire Chains, as hereinbefore alleged, but denies that it has recognized and accepted the American Chain and Cable Company, Inc., through mutual understanding, as the price leader in the industry.

This Respondent is informed and has recognized by virtue of a license agreement, that American Chain and

406 *Answer of Hodell Chain Company to Amended Complaint.*

Cable Company, Inc. is the owner of the following patents relating to improvements in Tire Chains, namely: Letters Patent, Beckwith, No. 1,536,556, May 5, 1925; Reyburn, No. 1,696,255, December 25, 1928; but this Respondent is without knowledge as to the date or dates of acquisition of said patents, or as to the ownership, date or dates of acquisition of other patents, if any.

This Respondent admits that anti-skid reinforced links are incorporated in tire chains substantially as alleged, but is without knowledge as to litigation between American Chain and Cable Company, Inc. and persons other than this Respondent, the method by which any such litigation
407 was settled or terminated, transactions or agreements between American Chain and Cable Company, Inc. and the McKay Company, and denies that this Respondent unlawfully entered into or was a party to any such alleged transactions and agreements.

This Respondent admits that it entered into a license agreement, in writing, with American Chain and Cable Company, Inc. on the 7th day of October, 1935, with respect to the United States patents therein described, upon the terms and conditions set forth in said agreement, and is informed and believes that said licensor has granted licenses to others, including Pyrene Manufacturing Company, St. Pierre Chain Corporation and S. G. Taylor Chain Company, at various times, which are in force and effect.

408 This Respondent admits that it has performed the terms and provisions of its license agreement aforesaid.

This Respondent denies that it has unlawfully communicated and conferred concerning prices, or arrived at understandings and agreements concerning prices, announced or to be announced, for the purpose and with the effect of eliminating price competition between this Respondent and its competitors, with respect to unpatented Tire Chains.

This Respondent admits that it has exercised the provisions provided in its said license agreement, including the purchase of parts at factory cost plus ten per cent from time to time; that the parts so purchased have been used for the purpose intended, namely, the manufacture of Tire Chains which were offered for sale and sold by this Respondent, as contemplated in its said license agreement, but denies that it offered for sale and sold said chains at prices arrived at by any understanding with the members of Chain Institute, Inc.

This Respondent denies that it intended that its said license agreement should not operate as a genuine license agreement; that it sought to use and did use its said license 410
agreement as a subterfuge and device to conceal from and deceive the public and Government officials; that it never intended to make the patented articles described in its said license agreement; that its said license agreement has been used as the fulcrum for unlawful price fixing agreements; that its said license agreement has served this Respondent as a device and scheme whereby resale prices were fixed and maintained on Tire Chains.

Except as hereinabove set forth, this Respondent denies each and every allegation of Paragraph Six.

Paragraph Seven. This Respondent denies that it entered into an unlawful agreement, during 1937, with Shirley, Olcott and Nichols, for the sale of Tire Chains to the 411
Federal Government through its various agencies in Washington, D. C., pursuant to, in furtherance of, and to make more effective the unlawful combination alleged in Paragraphs Five and Six of the amended complaint.

This Respondent alleges that it has sold a comparatively minor quantity of tire chains to Shirley, Olcott and Nichols, at prices agreed upon, from time to time, between Shirley, Olcott and Nichols and this Respondent; that Shirley, Ol-

cott and Nichols have been awarded contracts for tire chains, by agencies of the Federal Government. The method of marketing and procedure described in this Paragraph of this Respondent's answer was at all times well-known to the agencies and officials of the Federal Government purchasing from Shirley, Olcott and Nichols, and was, in fact, insisted upon by them for the purpose of more efficiently and effectively supplying the needs and necessities of the Federal Government and its agencies. This Respondent denies that it arranged for the American Chain and Cable Company, Inc. to instruct Shirley, Olcott and Nichols, or any of them, to serve as a common agent for
413 this Respondent and other persons in submitting bids to agencies of the Federal Government, at such prices as were prescribed by American Chain and Cable Company, Inc.

This Respondent is informed and believes that Shirley, Olcott and Nichols have purchased tire chains from other manufacturers, but is without knowledge of the quantities thereof.

This Respondent admits that on occasions it has submitted bids under seal to the Federal Government; that at times items bid upon have been casually identical with prices submitted by others, and likewise at other times not identical; that the officials of the Federal Government have proceeded according to law in making awards. This Respondent denies that its said acts were pursuant to prior
414 agreements with Respondent Members and Shirley, Olcott and Nichols, or Alfred Peter Shirley

This Respondent is without knowledge with respect to instructions alleged to have been given to Shirley, Olcott and Nichols, or Alfred Peter Shirley, and the effects of any alleged instructions.

This Respondent denies that its bids were fixed and agreed upon prior to their submission by cooperative and

collective action between and among representatives of Chain Institute, Inc., Shirley, Olcott and Nichols, and this Respondent.

Except as hereinabove set forth, this Respondent denies each and every allegation of Paragraph Seven.

PARAGRAPH EIGHT. This Respondent denies that it generally refrains from quoting f.o.b. its place of production, or shipment, prices that are independent of and unrelated to its marketing methods, for the purpose and with the result of making more effective the alleged unlawful combination referred to in Paragraph Five of the complaint; that its methods of marketing have been adopted and are 416
used for the purposes alleged in Paragraph Five of the complaint.

Except as hereinabove set forth, this Respondent denies each and every allegation of Paragraph Eight.

PARAGRAPH NINE. This Respondent denies that it has cooperatively employed, with others, for the purposes alleged what is described in the complaint as the "basing point pricing system". It admits that Welded Chain is sold at destination prices, but it denies that there is any mutual understanding, agreement or combination to sell Welded Chain, at any agreed price, or in any particular manner.

Except as hereinabove set forth, this Respondent denies 417
each and every allegation of Paragraph Nine.

PARAGRAPH TEN. This Respondent denies that it has cooperatively employed, with others, for the purposes alleged, what is described in the complaint as a "freight equalization pricing system". It admits that Weldless Chain is sold at destination prices, but it denies that there is any mutual

understanding, agreement or combination to sell Weldless Chain at any agreed price, or in any particular manner.

Except as hereinabove set forth, this Respondent denies each and every allegation of Paragraph Ten.

PARAGRAPH ELEVEN. This Respondent denies that it has cooperatively employed, with others, for the purposes alleged, what is described in the complaint as a "zone pricing system". It admits that Tire Chains are sold at destination prices, but it denies that there is any mutual understanding, agreement or combination to sell Tire Chains at any agreed price, or in any particular manner.

19

Except as hereinabove set forth, this Respondent denies each and every allegation of Paragraph Eleven.

PARAGRAPH TWELVE. This Respondent denies each and every allegation of Paragraph Twelve.

PARAGRAPH THIRTEEN. This Respondent denies each and every allegation of Paragraph Thirteen.

COUNT II

1. Respondent denies that this proceeding is pursuant to the Clayton Act; denies that the Commission has reason

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to believe, or that the fact is, that Respondents, or this Respondent, have violated or are violating the provisions of said Act as amended; and denies that this proceeding is in the public interest.

2. Respondent admits that the charges contained in Count II are as written.

PARAGRAPHS THREE and FOUR. Respondent refers to the allegations contained in Paragraphs Three and Four of its

answer to Count I hereof, and adopts the same in so far as the same are applicable, as if fully rewritten here.

PARAGRAPHS FIVE, SIX, SEVEN, EIGHT, NINE, TEN, ELEVEN and TWELVE. Respondent denies each and every allegation of Paragraphs Five, Six, Seven, Eight, Nine, Ten, Eleven and Twelve.

WHEREFORE, this Respondent respectfully prays that the amended complaint of the Federal Trade Commission, in this proceeding, be dismissed.

HODELL CHAIN COMPANY,
By F. N. HODELL, President, 422
3924 Cooper Avenue,
Cleveland, Ohio.

Filed November 26, 1945.

Answer of Respondent, St. Pierre Chain Corporation.

Now comes Respondent St. Pierre Chain Corporation, by its attorney, Charles R. Fay, and makes answer to the complaint of the Federal Trade Commission as follows:

1. This Respondent denies that it has violated any of the provisions of Section 5 of the Federal Trade Commission Act (U. S. C. title 15, Sec. 4) as alleged in said complaint, and Respondent denies that it has violated any provision of the Clayton Act, especially Section 2(a) thereof. 423

2. This Respondent denies all allegations of said complaint of which it has knowledge and which are not hereinafter specifically admitted.

COUNT I

PARAGRAPHS ONE AND TWO: Respondent herein specifically denies each and every allegation contained in paragraphs one and two.

PARAGRAPH THREE: Respondent admits that St. Pierre Chain Corporation is a corporation organized and existing under the laws of the State of Massachusetts with its principal offices located at Worcester, Massachusetts; Respondent also admits membership in Respondent Institute; as to all other allegations, Respondent is without knowledge. Respondent specifically denies forming, putting into
425 operation, or in any way effecting any methods, systems, practices and policies which are alleged to be unlawful, either singly or as a member of Respondent Institute, or in collective action with all or any of the others named herein as respondents. Except as above admitted, all obligations of paragraph three are denied.

PARAGRAPH FOUR: This Respondent admits the definitions of Welded, Weldless, and Tire chains as alleged in paragraph four of the complaint. Respondent admits that it is now and has been in commerce as defined in the complaint and that it continuously has been and now is in competition with the other Respondents who are members of the Chain Institute, Inc., and others.

426 Except as above admitted, this Respondent denies all the allegations in paragraph four of the complaint.

PARAGRAPH FIVE: This Respondent specifically denies each and every allegation contained in paragraph five of the complaint, and specifically denies all allegations contained in subparagraphs 1 to 18 of paragraph five.

PARAGRAPH SIX: This Respondent admits that on May 19, 1939 it entered into a certain license agreement, as licensee only, with Respondent American Chain & Cable Co., Inc., the latter being licensor, said license agreement concerning the manufacture and sale of tire chain as protected by certain patents; but this Respondent is without knowledge as to agreements or litigation alleged in paragraph six between other Respondents named in the complaint and said American Chain & Cable Co., Inc. Wherefore this Respondent is without knowledge as to whether its agreement with said American Chain & Cable Co., Inc., is similar to the agreements alleged as to said other Respondents. 428

Except as above admitted, all the allegations of paragraph six of the complaint are denied.

PARAGRAPH SEVEN: This Respondent is without knowledge as to the allegations of paragraph seven, but insofar as any allegations in this paragraph may be directed against or refer to this Respondent, such allegations are denied.

PARAGRAPH EIGHT: This Respondent denies each and every allegation contained in paragraph eight of the complaint.

PARAGRAPH NINE: In answer to paragraph nine, this Respondent denies each and every allegation contained in paragraph nine of the complaint. 429

PARAGRAPH TEN: In answer to paragraph ten of the complaint, this Respondent denies each and every allegation in paragraph ten of the complaint.

PARAGRAPH ELEVEN: This Respondent admits that it allows actual freight costs to customers on certain large

quantities or weights of tire chain ordered by and sold to such customers; with this exception Respondent denies each and every allegation of paragraph eleven and affirmatively alleges that Respondent's practice of allowing freight on quantity sales is not an unfair trade practice; that this question is an economic one and is not within the jurisdiction of the Federal Trade Commission within the intent and meaning of the Federal Trade Commission Act. Respondent alleges that this practice is for the purpose of competing with others.

PARAGRAPH TWELVE: This Respondent denies each and
431 every allegation contained in paragraph twelve of the complaint.

PARAGRAPH THIRTEEN: This Respondent denies each and every allegation contained in paragraph thirteen of the complaint.

COUNT II

PARAGRAPH ONE: This Respondent denies that it has violated or is violating any of the provisions of an Act of Congress approved October 15, 1914, commonly known as the Clayton Act, as amended by an Act of Congress approved June 19, 1936, commonly known as the Robinson-Patman Act.

432 PARAGRAPH TWO: This Respondent denies the allegations of paragraph two.

PARAGRAPHS THREE AND FOUR: This Respondent incorporates its answers to paragraphs three and four inclusive of Count I to the same extent and effect as if each and all of such answers were set forth in full and repeated in this answer to Count II.

PARAGRAPH FIVE: This Respondent denies each and every allegation of paragraph five.

PARAGRAPH SIX: This Respondent denies each and every allegation of paragraph six.

PARAGRAPH SEVEN: This Respondent denies each and every allegation of paragraph seven.

PARAGRAPH EIGHT: This Respondent denies each and every allegation of paragraph eight.

PARAGRAPH NINE: This Respondent denies each and every allegation of paragraph nine. 434

PARAGRAPH TEN: This Respondent denies each and every allegation of paragraph ten and alleges that the questions involved are economic and not within the jurisdiction of the Federal Trade Commission within the intent and meaning of the Federal Trade Commission Act.

PARAGRAPH ELEVEN: This Respondent denies each and every allegation of paragraph eleven.

PARAGRAPH TWELVE: This Respondent denies each and every allegation of paragraph twelve.

WHEREFORE, Respondent St. Pierre Chain Corporation, having fully answered the amended complaint of the Federal Trade Commission, prays that said complaint against it be dismissed. 435

ST. PIERRE CHAIN CORPORATION.
By CHARLES R. FAY,
its Attorney,
32 Franklin Street,
Worcester, Massachusetts.

Filed November 26, 1945.

436

Answer of the Respondent S. G. Taylor Chain Company to the Amended Complaint of Federal Trade Commission.

Now comes S. G. Taylor Chain Company, one of the respondents in the above entitled cause, hereinafter referred to as "Respondent", by Sidley, Austin, Burgess and Harper, its attorneys, and for answer to the Amended Complaint of Federal Trade Commission heretofore filed herein Respondent denies that it has violated Section 5 of the Federal Trade Commission Act or Section 2(a) of the Clayton Act as alleged in said Amended Complaint, and denies each and every allegation contained in said Amended Complaint in so far as said allegations refer to or are intended to refer to Respondent, except as such allegations are hereinafter specifically admitted or explained.

437

Answer to Count I

Further answering Count I of said Amended Complaint and each paragraph thereof, Respondent alleges:

Paragraph One: Respondent denies that it has violated the provisions of Section 5 of the Federal Trade Commission Act as alleged in Paragraph One of said Amended Complaint, and denies that these proceedings against Respondent are in the public interest.

438

Paragraph Two: Respondent denies each and all of the charges contained in Paragraph Two of said Amended Complaint in so far as the allegations of said paragraph refer to or are intended to refer to Respondent.

Paragraph Three: Respondent admits the allegations of subparagraphs (1), (8) and (20) of Paragraph Three of said Amended Complaint, and further admits that Respond-

ent is a member of Chain Institute, Inc., but Respondent denies each and every other allegation contained in said Paragraph Three in so far as said allegations refer to or are intended to refer to Respondent, except as said allegations are hereinafter specifically admitted or explained, and is without knowledge as to allegations that refer to or are intended to refer to others.

PARAGRAPH FOUR: Respondent is without knowledge as to the dates when American Chain & Cable Company, Inc. and The McKay Company acquired the patents referred to in Paragraph Four of said Amended Complaint, and 440
Respondent is also without knowledge as to whether the respondents named in said Amended Complaint manufacture, sell or distribute practically all of the Welded Chain, Weldless Chain or Tire Chains produced in the United States. Respondent denies that it is engaged in the manufacture, sale or distribution of Weldless Chain, and further alleges that it is and at all times mentioned in said Amended Complaint has been in active and substantial competition with all other manufacturers of Welded Chain and Tire Chains in making and seeking to make sales of its products in commerce. Except as stated above, Respondent admits the allegations of Paragraph Four of said Amended Complaint except that Respondent is without knowledge of the said allegations in so far as they refer to or are intended to refer to the acts of others. 441

PARAGRAPH FIVE: Respondent denies each and every allegation contained in Paragraph Five of said Amended Complaint in so far as said allegations refer to or are intended to refer to this Respondent and is without knowledge of the truth of said allegations in so far as they refer to or are intended to refer to others, except as said allegations are hereinafter specifically admitted or explained.

442 *Answer of the Respondent S. G. Taylor Chain Company to the Amended Complaint of Federal Trade Commission.*

Respondent further denies that Respondent has been or is now a party to any unlawful combination either as alleged in said Paragraph Five or otherwise and denies that the general purpose or result of any act or acts of Respondent was as alleged in said paragraph. Further answering subparagraphs (1) to (18), inclusive, of Paragraph Five of said Amended Complaint in so far as the allegations of said subparagraphs refer to or are intended to refer to Respondent,

(1) Respondent denies each and every allegation contained in subparagraph (1) of Paragraph Five of
443 said Amended Complaint.

(2) Respondent admits that Chain Institute, Inc., is an incorporated trade association operated to promote and serve the mutual interests of its members, but denies each and every other allegation contained in subparagraph (2).

(3) Respondent admits that Dennis A. Merriman was hired by said Institute as Managing Director on or about August 1, 1938, but denies each and every other allegation contained in subparagraph (3).

(4) Respondent denies each and every allegation in subparagraph (4).

(5) Respondent denies each and every allegation
444 contained in subparagraph (5).

(6) Respondent sells certain of its products on a delivered price basis, but Respondent denies each and every other allegation contained in subparagraph (6).

(7) Except as the allegations of subparagraph (7) are hereinafter specifically explained in Paragraphs Eight, Nine, Ten and Eleven of this Answer, Respond-

ent denies each and every allegation of said subparagraph.

(8) Respondent denies each and every allegation contained in subparagraph (8) except that Respondent states that Respondent has from time to time received from said Institute lists of published freight rates applying from Pittsburgh, Pennsylvania, to other points in the United States which Respondent is informed and believes were prepared by one Charles Donley.

(9) Respondent denies each and every allegation 446
contained in subparagraph (9) of Paragraph Five of said Amended Complaint.

(10) Respondent has from time to time by correspondence or otherwise discussed with others prices quoted and charged for chain and chain products, but Respondent denies that said acts of Respondent were pursuant to any combination or conspiracy, or involved any agreement with respect to prices, or violated any law, and denies that Respondent has ever been a party to any agreement with respect to prices quoted or to be quoted for chain or chain products. Except as stated above, Respondent denies each and every allegation of subparagraph (10).

(11) Respondent admits that there have been meet- 447
ings of the members of said Institute, but denies each and every other allegation contained in subparagraph (11).

(12) Prices and price quotations on chain and chain products have been discussed at meetings of the members of said Institute, but Respondent denies that such discussions were pursuant to or involved any com-

bination or agreement to fix prices or involved any agreement with respect to prices or violated any law. Respondent further denies each and every allegation contained in subparagraph (12) and alleges that Respondent at no time has been a party to any agreement with respect to prices or price quotations on chain or chain products.

(13) Respondent denies each and every allegation contained in subparagraph (13).

(14) Respondent denies each and every allegation
449 contained in subparagraph (14) of Paragraph Five of said Amended Complaint.

(15) Respondent denies each and every allegation contained in subparagraph (15).

(16) Respondent denies each and every allegation contained in subparagraph (16).

(17) Respondent denies each and every allegation contained in subparagraph (17).

(18) Respondent denies each and every allegation of subparagraph (18).

PARAGRAPH SIX: Respondent denies each and every allegation contained in the last of the several paragraphs of
450 said Amended Complaint captioned "Paragraph Six", in so far as said allegations refer to Respondent. Respondent is informed and believes that American Chain & Cable Company, Inc. acquired ownership or control over certain patent inventions covered by United States Letters Patent No. 1,536,556, No. 1,696,255 and No. 2,180,101 substantially as described in said Paragraph Six, and Respondent admits that on or about July 12, 1939, Respondent made and entered into a certain License Agreement with said American

451

Chain & Cable Company, Inc. containing, among others, terms and provisions substantially similar to those described in said Paragraph. The provisions of said License Agreement providing that the Licensee "should not sell tire chains at any price except that specified" by the Licensor were cancelled and abandoned on or about July 22, 1943, by mutual consent and agreement of the parties. The other provisions of said License Agreement have not been terminated. Respondent denies that Respondent arrived at any understanding or agreement with said Licensor or with others concerning the prices that should be or were announced by the Licensor for the sale of Respondent's products manufactured under said License Agreement as alleged in said Paragraph Six, and further denies that Respondent was a party to any understanding or agreement of any kind or character whatsoever with respect to the prices that should be or were announced by said Licensor either as described in said Amended Complaint or otherwise. Respondent admits that Respondent exercised its contract right provided by said License Agreement to purchase parts of tire chains which contained the patented anti-skid bar reinforced features referred to in said Amended Complaint from the Licensor at factory cost plus 10%. Except as stated above, Respondent has no knowledge as to the allegations contained in Paragraph Six of said Amended Complaint.

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PARAGRAPH SEVEN: Respondent has no knowledge as to the allegations contained in Paragraph Seven of said Amended Complaint. If any of said allegations refer to or are intended to refer to Respondent, Respondent denies each and all of said allegations, but Respondent states that from time to time during the years 1940 through 1942 Respondent sold relatively insignificant quantities of tire chains to Shirley, Olcott and Nichols.

454 *Answer of the Respondent S. G. Taylor Chain Company to the Amended Complaint of Federal Trade Commission.*

PARAGRAPH EIGHT: Respondent denies each and every allegation contained in Paragraph Eight of said Amended Complaint except in so far as said allegations are hereinafter specifically admitted or explained in Paragraphs Nine, Ten and Eleven of this Answer.

PARAGRAPH NINE: Respondent has been engaged in the manufacture and sale of welded chain and welded chain products since 1904. From time to time during the years 1904 to 1941, inclusive, Respondent has used a so-called single basing point pricing system substantially as de-
455 scribed in Paragraph Nine of said Amended Complaint in the sale of some or all of its welded chain and welded chain products and in publishing price lists relating to such products. During said years Respondent has adopted said so-called single basing point pricing system when forced to do so by competition or when required by conditions in the welded chain industry to adopt said single basing point pricing system in order to dispose of its products. Respondent's use of said single basing point pricing system has been in good faith and to meet competition and not for the purpose of discriminating against Respondent's customers or others or for the purpose of suppressing price competition. From time to time during said years Respondent has also sold welded chain and welded chain products f.o.b. its plant in Hammond, Indiana, and on a
456 delivered price basis and on other and different pricing systems. During the years 1942 to 1944, inclusive, not more than 40% of Respondent's welded chain and welded chain products were sold pursuant to a single basing point pricing system. Since the spring of 1945 none of Respondent's said products have been so quoted or sold. Respondent used said single basing point pricing system as described above because required to do so to meet competition, and said pricing system has been used by Respondent

as aforesaid independently and not as a result of any combination or agreement, express or implied, with any other person or persons. The use of said single basing point pricing system by Respondent did not prevent or hinder competition or suppress price competition or deprive customers of any price advantage as alleged in Paragraph Nine of said Amended Complaint, or any other advantage, nor did the use of said single basing point pricing system as aforesaid by Respondent discriminate against or result in discrimination against any of Respondent's customers or others. Except as stated above, Respondent denies each and every allegation contained in Paragraph Nine of said 458
Amended Complaint in so far as said allegations refer to or are intended to refer to Respondent and is without knowledge as to the truth of said allegations in so far as they refer to others.

PARAGRAPH TEN: Respondent is not engaged and has not been engaged in the manufacture of weldless chain and denies each and every allegation contained in Paragraph Ten of said Amended Complaint in so far as said allegations refer to or are intended to refer to Respondent. Respondent is without knowledge as to said allegations in so far as they refer to others.

PARAGRAPH ELEVEN: To most competition Respondent has sold and sells tire chains to jobbers and wholesalers in 459
quantities of not less than 24 pairs (or their equivalent) at a list price less discount and allows actual freight from its plant at Hammond, Indiana, to purchaser's destination, the purchaser paying the carrier the amount of such freight. Respondent does not use this so-called zone pricing system in the sale of tire chains in small lots to jobbers, wholesalers, retailers, consumers or others or in the sale of tire chains to the Government or to motor car manufacturers.

460 *Answer of the Respondent S. G. Taylor Chain Company to the Amended Complaint of Federal Trade Commission.*

Except as stated above, Respondent denies each and every allegation contained in Paragraph Eleven of said Amended Complaint in so far as said allegations refer to or are intended to refer to Respondent, and denies that said so-called zone pricing system described therein suppresses price competition or deprives Respondent's customers of any price advantage as alleged in Paragraph Eleven of said Amended Complaint, or any other advantage, and further denies that Respondent's use of said so-called zone pricing system discriminates against any of Respondent's customers. Respondent further alleges that Respondent's
461 use of said so-called zone pricing system has been in good faith and to meet competition and not for the purpose of discriminating against Respondent's customers or others or for the purpose of suppressing competition. Respondent has used said pricing system, as aforesaid, independently and not as a result of any combination or agreement, express or implied, with any other person or persons. Respondent has no knowledge as to the allegations of said Paragraph Eleven of said Amended Complaint in so far as said allegations are intended to refer to others than Respondent.

PARAGRAPH TWELVE: Respondent denies that either the purpose or effect of any act or acts of Respondent was or is as described in Paragraph Twelve of said Amended
462 Complaint and denies each and every allegation contained in said paragraph in so far as said allegations refer to or are intended to refer to Respondent.

PARAGRAPH THIRTEEN: Respondent denies each and every allegation contained in Paragraph Thirteen of said Amended Complaint in so far as said allegations refer to

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or are intended to refer to Respondent or to any act or acts of Respondent or to the purpose or effect of any of said act or acts.

ANSWER TO COUNT II

In answer to Count II of said Amended Complaint Respondent denies that it has violated the provisions of the Clayton Act or the provisions of the Robinson-Patman Act as alleged in said Count II of said Amended Complaint, and further alleges that any difference or differences in Respondent's prices to different purchasers of Respondent's products referred to in said Count II, if any, were justifiable differences in price or prices made in good faith to meet the equally low price or prices of a competitor or competitors or resulted from price changes in response to changing conditions affecting the market for or the marketability of Respondent's products. Respondent further alleges that said differences in price or prices did not lessen competition or tend to create a monopoly in any line of commerce or to injure, destroy or prevent competition, nor could the effect of such differences in price or prices reasonably affect or lessen competition or tend to create a monopoly, nor were or are any of said differences in price or prices unreasonable or prohibited by law.

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Further answering Count II of said Amended Complaint and each paragraph thereof, Respondent alleges:

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PARAGRAPH ONE: Respondent denies that it has violated the provisions of the Clayton Act as alleged in Paragraph One of said Amended Complaint, and denies that these proceedings against Respondent are in the public interest.

PARAGRAPH TWO: Respondent denies the charges contained in Paragraph Two of said Amended Complaint and denies each and every allegation contained in said paragraph in so far as said allegations are intended to refer to Respondent.

PARAGRAPHS THREE AND FOUR: As Paragraphs Three and Four of its answer to Count II, Respondent incorporates Paragraphs Three and Four, inclusive, of its answer to Count I of said Amended Complaint to precisely the same extent and effect as if each and all of them were set forth in full and repeated verbatim in this answer to Count II of said Amended Complaint.

PARAGRAPH FIVE: Respondent denies each and every allegation contained in Paragraph Five of said Amended Complaint in so far as said allegations refer to or are intended to refer to Respondent, except as the supposed matters referred to in said allegations are heretofore or hereafter explained. Respondent is without knowledge as to said allegations referring to others.

PARAGRAPH SIX: Respondent denies each and every allegation contained in Paragraph Six of said Amended Complaint in so far as said allegations refer to or are intended to refer to Respondent except in so far as the allegations therein contained are admitted or explained by Respondent's aforesaid answer to Paragraph Eleven of Count I of said Amended Complaint. Respondent is without knowledge as to said allegations in so far as they refer to others.

PARAGRAPH SEVEN: Respondent denies each and every allegation contained in Paragraph Seven of said Amended

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Complaint in so far as said allegations refer to or are intended to refer to Respondent except in so far as the allegations therein contained are admitted or explained by Respondent's aforesaid answer to Paragraph Nine of Count I of said Amended Complaint. Respondent is without knowledge as to said allegations in so far as they refer to others.

PARAGRAPH EIGHT: Respondent denies each and every allegation contained in Paragraph Eight of said Amended Complaint in so far as said allegations are intended to refer to Respondent except as the supposed matters referred to in said allegations have been heretofore specifically explained. Respondent is without knowledge as to said allegations in so far as they refer to others.

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PARAGRAPH NINE: Respondent denies the allegations of Paragraph Nine of said Amended Complaint.

PARAGRAPH TEN: Respondent denies that either the purpose or effect of any act or acts of Respondent was or is as described in Paragraph Ten of said Amended Complaint and denies each and every allegation included in said paragraph in so far as said allegations refer to or are intended to refer to Respondent.

PARAGRAPH ELEVEN: Respondent denies each and every allegation contained in Paragraph Eleven of said Amended Complaint in so far as the allegations of said paragraph have reference to this Respondent or to any act or acts of this Respondent or to the purpose or effect of any said act or acts.

471

PARAGRAPH TWELVE: Respondent denies the allegations of Paragraph Twelve of said Amended Complaint.

472 *Answer of the Respondent S. G. Taylor Chain Company to the Amended Complaint of Federal Trade Commission.*

WHEREFORE, the Respondent, S. G. Taylor Chain Company, having fully answered the Amended Complaint of Federal Trade Commission heretofore filed in this cause, respectfully prays that the Amended Complaint be dismissed as to it.

S. G. TAYLOR CHAIN COMPANY.
By SIDLEY, AUSTIN, BURGESS AND HARPER,
Its Attorneys.

473 SIDLEY, AUSTIN, BURGESS & HARPER,
11 South La Salle Street,
Chicago, Illinois,
Attorneys for S. G. Taylor Chain Company.

Filed November 13, 1945.

Answer of Respondent Columbus McKinnon Chain Corporation to Amended Complaint.

Now comes COLUMBUS McKINNON CHAIN CORPORATION, hereinafter sometimes referred to as "THIS RESPONDENT" and for answer to the amended complaint herein, admits, denies and alleges as hereinafter set forth.

474

Answering generally the amended complaint, this respondent denies that it has ever been a party to any violation of the provisions of the Federal Trade Commission Act, the Clayton Act as amended by the Robinson-Patman Act or any other laws of the United States.

Answering specifically the amended complaint, with the paragraphs numbered to correspond with the paragraph numbers in the complaint:—

Answer of Respondent Columbus McKinnon Chain Corporation to Amended Complaint. 475

1. Denies each allegation contained in Paragraph 1 of Count I and specifically denies that this respondent has violated the provisions of Section 5 of the Federal Trade Commission Act.

2. Denies each allegation contained in paragraph 2 of Count I and specifically denies that this respondent has ever combined and conspired to restrain trade and commerce in the sale of chain and chain parts among the several states of the United States.

3. This respondent admits that it is a member of the Institute. 476

Admits the allegations contained in subdivisions 1, 10 and 20 of paragraph 3 of Count I,

Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in subdivisions 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 25, 26 and 27 of said Paragraph 3.

Except as to those matters hereinabove expressly admitted, or as to which this respondent has alleged that it is without knowledge or information sufficient to form a belief as to the truth of such allegations, this respondent denies each allegation of said paragraph 3.

4. Admits the allegations contained in the 2nd and 5th sub-paragraphs of paragraph 4 of Count I, but alleges that such allegations are incomplete and inadequate. 477

Admits that in the trade, welded chain is also referred to as commercial chain and pound chain and that it is priced by the manufacturers on a per pound basis, but denies each other allegation contained in sub-paragraph 3 of said paragraph 4.

478 *Answer of Respondent Columbus McKinnon Chain Corporation to Amended Complaint.*

Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the 1st, 4th and 6th sub-paragraphs of said paragraph 4.

Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in sub-paragraph 7 of said paragraph 4, except that it admits that it manufactures, sells and distributes welded chain and tire chains.

Denies each allegation in the 8th sub-paragraph of said paragraph 4 and alleges that said respondent members and
479 other members of the industry are now in active and substantial competition with each other, and that said respondent members and other members of the industry have always been and now are in active and substantial competition with each other.

5. Denies each allegation contained in paragraph 5 of Count I and in particular this respondent denies sub-paragraphs 1, 16 and 17 thereof and alleges that it has not had any dealings or connection of any kind or nature whatsoever with respondents Shirley, Olcott and Nichols.

6. Denies that it has recognized and accepted through mutual understanding or otherwise, American as the price
480 leader in the industry and alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 6 of Count I.

7. This respondent, not having had any dealings or connection of any kind or nature whatsoever with respondents Shirley, Olcott and Nichols, alleges that it is without knowledge or information sufficient to form a belief as to the

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truth of the allegations contained in paragraph 7 of Count I.

8. Denies each allegation contained in paragraph 8 of Count I.

9. Denies each allegation contained in paragraph 9 of Count I and alleges that the use of Basing Points in selling or shipping its products is a normal and natural method of sale and distribution which promotes competition in the industry and its elimination would result in the establishment of monopolies and monopolistic control by reason of the geographical location of the various respondents' 482
plants, thereby destroying competition and eliminating from the industry those manufacturers whose continuance in business is dependent on their continuing to sell chain products on a delivered price basis. To eliminate Basing Points would guarantee to each respondent a zone where monopolistic power would prevail.

This respondent further alleges that the use of Basing Points is the natural result of basic economic conditions in the Chain Industry, is consistent with free and open competition in the industry and does not result in monopolistic control over prices or discriminatory treatment between customers nor does it constitute an unfair method of competition.

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This respondent further alleges that Basing Points have been used by the industry for many years and are not the result of any combination or agreement, express or implied, between respondents.

This respondent further alleges that any respondent is at liberty to establish a new pricing method.

This respondent further alleges that the use of Basing Points is solely an economic problem and is not an unfair

trade practice and hence is not within the jurisdiction of the Federal Trade Commission.

10. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 10 of Count I and further alleges that this respondent has not manufactured and does not manufacture weldless chain, but from time to time buys weldless chain from manufacturers thereof to fill such orders as may be received from its customers.

11. Denies each allegation contained in paragraph 11 of
485 Count I and alleges that Zone Pricing is a normal and natural method of sale and distribution which promotes competition in the industry and its elimination would result in the establishment of monopolies and monopolistic control by reason of the geographical location of the various respondents' plants, thereby destroying competition and eliminating from the industry those manufacturers whose continuance in business is dependent on their continuing to sell chain products on a delivered price basis. To eliminate Zone Pricing would guarantee to each respondent a zone where monopolistic power would prevail.

This respondent further alleges that Zone Pricing is the natural result of basic economic conditions in the Chain Industry, is consistent with free and open competition in
486 the industry and does not result in monopolistic control over prices or discriminatory treatment between customers nor does it constitute an unfair method of competition.

This respondent further alleges that Zone Pricing has been used by the industry for many years and is not the result of any combination or agreement, express or implied, between respondents.

This respondent further alleges that any respondent is at liberty to establish a new pricing method.

This respondent further alleges that Zone Pricing is solely an economic problem and is not an unfair trade practice and hence is not within the jurisdiction of the Federal Trade Commission.

12. Denies each allegation contained in paragraph 12 of Count I.

13. Denies each allegation contained in paragraph 13 of Count I.

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ANSWER TO COUNT II.

1. Denies each allegation contained in paragraph 1 of Count II and specifically denies that this respondent has violated or is violating the provisions of the Clayton Act as amended by the Robinson-Patman Act.

2. Denies each allegation contained in paragraph 2 of Count II.

3. & 4. This respondent repeats paragraphs 3 and 4 of its answer to Count I as though each were set forth in full and repeated verbatim in this answer to Count II.

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5. Denies each allegation contained in paragraph 5 of Count II.

6. Denies each allegation contained in paragraph 6 of Count II.

7. Denies each allegation contained in paragraph 7 of Count II.

490 *Answer of Respondent Columbus McKinnon Chain Corporation to Amended Complaint.*

8. Denies each allegation contained in paragraph 8 of Count II.

9. Denies each allegation contained in paragraph 9 of Count II.

10. Denies each allegation contained in paragraph 10 of Count II.

11. Denies each allegation contained in paragraph 11 of Count II.

491 12. Denies each allegation contained in paragraph 12 of Count II.

Denies each allegation of fact and conclusion of law contained in Count I and Count II of said Amended Complaint not herein specifically admitted to be true, or as to which this respondent has heretofore stated that it is without knowledge.

WHEREFORE, this respondent, Columbus McKinnon Chain Corporation, prays that the Amended Complaint be dismissed as to it.

Dated: November 20, 1945.

492 COLUMBUS McKINNON CHAIN CORPORATION,
By FINCK & HUBER,
804 Liberty Bank Building,
Buffalo, N. Y.,
Its Attorneys.

Filed November 26, 1945.

493

Answer of International Chain & Manufacturing Company.

Now comes Respondent, International Chain & Manufacturing Company, by Frederick B. Gerber, its attorney, and makes answer to the Amended Complaint filed in the above entitled matter and for answer thereto says:

Answering generally the amended complaint International Chain & Manufacturing Company (sometimes hereinafter referred to as International) denies that it has violated, or is violating, or has been, or is a party to any violation of, any of the provisions of the Federal Trade Commission Act, the Clayton Act as amended or the Robinson-Patman Act, as alleged in the amended complaint.

494

Answering specifically the amended complaint International says:

Answer to Count I.

I.

Referring to Paragraph One of Count I of the Amended Complaint, International Chain & Manufacturing Company says:

International denies each and every one of the allegations contained therein.

II.

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Referring to Paragraph Two of Count I of the Amended Complaint, International says:

International denies each and every one of the allegations contained therein.

III.

Referring to Paragraph Three of Count I of the Amended Complaint, International says:

The allegations in sub-paragraphs (1), (11) and (20) are admitted.

The allegations in sub-paragraph (21) were true formerly but Walter S. McCann is now dead and is no longer Secretary and Treasurer of Respondent Institute.

The allegations in sub-paragraph (22) are admitted, except as follows: Wm. D. Kirkpatrick is no longer Presi-
497 dent of Respondent Institute.

The allegations in sub-paragraph (23) are denied except that Respondent, Frank A. Bond, an individual, is Executive Vice President and Secretary of Respondent McKay.

The allegations in sub-paragraph (24) are admitted except the allegation that Respondent, George J. Campbell, Jr., is Vice President of Respondent Institute. He formerly was but no longer is such Vice President.

International is without knowledge as to the allegations in sub-paragraphs (2) to (10) inclusive, (12) to (19) inclusive and (25) to (27) inclusive.

Referring to the next to the last sub-paragraph of Paragraph Three of the Amended Complaint, International
498 says:

It denies each and every one of the allegations contained therein except that it is a member of said Institute. It denies, however, that it was a member thereof during the period July 17, 1939 to July 15, 1940.

Referring to the last sub-paragraph of Paragraph Three of the amended Complaint, International says:

It denies each and every one of the allegations contained therein.

IV.

Referring to Paragraph Four of Count I of the Amended Complaint, International says:

The allegations in sub-paragraphs (1) to (7) inclusive are admitted except those contained in the last sentence of sub-paragraph (6) which are denied.

Referring to sub-paragraph (8), International says:

It is true that prior to the time referred to in said sub-paragraph as the time of "the adoption of the practices hereinafter described" the Respondent Members of the Institute were in active and substantial competition with each 500
other and with other Members of the Chain Industry in making and seeking to make sales of their products in trade and commerce between and among the several states of the United States and in the District of Columbia. And International alleges that such active and substantial competition does continue and the said Respondent Members are now in active and substantial competition with each other and with other Members of the Industry. Except as thus admitted and alleged the allegations of said sub-paragraph are denied.

V.

Referring to Paragraph Five of Count I of the Amended Complaint, International says: 501

It denies each and every one of the allegations contained therein, except, however, it admits the writing of the letter referred to in sub-paragraph (3).

502 *Answer of International Chain & Manufacturing Company.*

VI.

Referring to Paragraph Six of Count I of the Amended Complaint, International says:

Referring to sub-paragraph 1, International says: As to the allegations in the first two sentences thereof it states that it is without knowledge as to the same. And as to the allegations in the last sentence thereof it denies the same.

International is without knowledge as to the allegations in sub-paragraphs 2 and 3.

International denies the allegations contained in sub-
503 paragraph 4.

Referring to sub-paragraph 5 thereof, International says:

It denies the alleged "Joint, concerted and effective action to maintain prices." And as to the other allegations in said sub-paragraph it states that it is without knowledge as to the same.

International is without knowledge as to the allegations in sub-paragraphs 6 and 7.

International denies the allegations contained in sub-paragraphs 8 and 9.

Referring to sub-paragraph 10 thereof, International says:

504

It denies that prices on unpatented tire chains were fixed "by combination of Respondents set forth in Paragraph Five" of the Amended Complaint and denies the alleged combination. As to the other allegations contained therein International states it is without knowledge as to the same.

VII.

Referring to Paragraph Seven of Count I of the Amended Complaint, International says:

It denies the alleged "unlawful combination which is set forth in Paragraphs Five and Six" of the Amended Complaint. As to the other allegations contained therein International states it is without knowledge as to the same.

VIII.

Referring to Paragraph Eight of Count I of the Amended Complaint, International says: 506

It denies each and every one of the allegations contained therein.

IX.

Referring to Paragraph Nine of Count I of the Amended Complaint, International says:

It alleges that it usually sells welded chain at a base price F. O. B. Pittsburgh, Pennsylvania, basis; the buyer paying freight from York (where International's plant is located) to destination and being allowed credit for the difference between the freight from York to destination and the freight rate from Pittsburgh to destination. And consequently the actual delivered cost to the buyer equals the base price of the chain plus a sum equal to the freight rate from Pittsburgh to destination. 507

International alleges that said pricing system used by it in connection with the sale of welded chain was so used by it without any understanding, agreement or combination of any kind whatsoever with any other person or corporation whomsoever. That it has used said system since it

has been in the business of selling welded chain—during the period of twenty-one years. It alleges that said system does not constitute an unfair method of competition in commerce or an unfair or deceptive act or practice in commerce. Said system does not prevent or hinder competition. On the contrary it promotes competition in the industry. But for its use monopolies around the respective manufacturing plants of the respondents would result and competition would thereby be destroyed. It does not result in monopolistic control over prices or discriminatory treatment among customers. Its use constitutes a fair method of competition and promotes the public interest. Its use
509 is proper and legal.

Except as hereinabove set forth, International denies each and every allegation contained in said Paragraph Nine.

X.

Referring to Paragraph Ten of Count I of the Amended Complaint, International says:

The principal places in the United States where weldless chain is manufactured are York in Pennsylvania, Cleveland in Ohio, Cincinnati in Ohio and Bridgeport in Connecticut. International usually sells weldless chain at a base price F. O. B. York basis, or Cleveland basis, or Cincinnati basis
510 or Bridgeport basis, whichever of said four points is nearest freight-wise to destination; the buyer paying freight from York (where International's plant is located) to destination and being allowed credit for the difference between the freight from York to destination and the freight rate from the said nearest freightwise point to destination. And consequently the actual delivered cost to the buyer equals the base price of the chain plus a sum equal to the

freight rate from the said nearest freight-wise point to destination.

International alleges that said pricing system used by it in connection with the sale of weldless chain was so used by it without any understanding, agreement or combination of any kind whatsoever with any other person or corporation whomsoever. That it has used said system since it has been in the business of selling weldless chain—during the period of twenty-one years. It alleges that said system does not constitute an unfair method of competition in commerce or an unfair or deceptive act or practice in commerce. Said system does not prevent or hinder competition. On the contrary it promotes competition in the in- 512
dustry. But for its use monopolies around the respective manufacturing plants of the respondents would result and competition would thereby be destroyed. It does not result in monopolistic control over prices or discriminatory treatment among customers. Its use constitutes a fair method of competition and promotes the public interest. Its use is proper and legal.

Except as hereinabove set forth, International denies each and every allegation contained in said Paragraph Ten.

Referring to Paragraph Eleven of Count I of the Amended Complaint, International says:

International usually sells tire chains at a base price uni- 513
form throughout the United States F. O. B. York, Pennsylvania (where its plant is located), the buyer paying the freight from York to destination and being allowed a credit for the freight; except that on orders of less than one hundred and fifty pounds the buyer is not allowed any freight credit.

International alleges that said pricing system used by it in connection with the sale of tire chains was so used by it

without any understanding, agreement or combination of any kind whatsoever with any other person or corporation whomsoever. That it has used said system since it has been in the business of selling tire chains—during the period of twenty-one years. It alleges that said system does not constitute an unfair method of competition in commerce or an unfair or deceptive act or practice in commerce. Said system does not prevent or hinder competition. On the contrary it promotes competition in the industry. But for its use monopolies around the respective manufacturing plants of the respondents would result and competition would thereby be destroyed. It does not result
15 in monopolistic control over prices or discriminatory treatment among customers. Its use constitutes a fair method of competition and promotes the public interest. Its use is proper and legal.

Except as hereinabove set forth, International denies each and every allegation contained in said Paragraph Eleven.

XII.

Referring to Paragraph Twelve of Count I of the Amended Complaint, International says:

It denies each and every one of the allegations contained therein.

6

XIII.

Referring to Paragraph Thirteen of Count I of the Amended Complaint, International says:

It denies each and every one of the allegations contained thereon.

ANSWER TO COUNT II.

I.

Referring to Paragraph One of Count II of the Amended Complaint, International says:

It denies each and every one of the allegations contained therein.

II.

Referring to Paragraph Two of Count II of the Amended Complaint, International says: 518

It denies each and every one of the allegations contained therein.

III and IV.

Referring to Paragraphs Three and Four of Count II of the Amended Complaint, International incorporates Paragraphs III and IV of its answer to Count I of the Amended Complaint to precisely the same extent and effect as if each and all of them were set forth in full and repeated verbatim in this Answer to Count II of the Amended Complaint, except the definition of the term "commerce". The term "commerce" as hereinafter used means "Commerce" as defined and set forth in the Clayton Act. 519

V.

Referring to Paragraph Five of Count II of the Amended Complaint, International says:

It admits and repeats and incorporates herein the allegations set forth in its answers to Paragraphs Nine, Ten and Eleven of Count I of the Amended Complaint. It denies

each and every allegation contained in said Paragraph Five, except to the extent of the allegations hereby admitted, repeated and incorporated herein.

VI.

Referring to Paragraph Six of Count II of the Amended Complaint, International says:

It admits and repeats and incorporates herein the allegations set forth in its answer to Paragraphs Nine, Ten and Eleven of Count I of the Amended Complaint. It denies
521 each and every allegation contained in said Paragraph Six, except to the extent of the allegations hereby admitted, repeated and incorporated herein.

VII.

Referring to Paragraph Seven of Count II of the Amended Complaint, International says:

It admits and repeats and incorporates herein the allegations set forth in its answers to Paragraphs Nine, Ten and Eleven of Count I of the Amended Complaint. It denies each and every allegation contained in said Paragraph Seven, except to the extent of the allegations hereby ad-
522 mitted, repeated and incorporated herein.

VIII.

Referring to Paragraph Eight of Count II of the Amended Complaint, International says:

It denies each and every one of the allegations contained therein.

IX.

Referring to Paragraph Nine of Count II of the Amended Complaint, International says:

It admits and repeats and incorporates the allegations set forth in its answers to Paragraphs Nine, Ten and Eleven of Count I of the Amended Complaint. It denies each and every allegation contained in said Paragraph Nine, except to the extent of the allegations hereby admitted, repeated and incorporated herein.

X.

524

Referring to Paragraph Ten of Count II of the Amended Complaint, International says:

It denies each and every one of the allegations contained therein.

XI.

Referring to Paragraph Eleven of Count II of the Amended Complaint, International says:

It denies each and every one of the allegations contained therein.

XII.

525

Referring to Paragraph Twelve of Count II of the Amended Complaint, International says:

It denies each and every one of the allegations contained therein.

WHEREFORE, the Respondent, International Chain & Manufacturing Company, prays that said Amended Complaint be dismissed as to it.

INTERNATIONAL CHAIN & MANUFACTURING COMPANY,
By FREDERICK B. GERBER, its Attorney,
Court House Annex,
36 East Market Street,
York, Penna.

Filed November 26, 1945.

527

Answer of Respondent, Nixdorff-Krein Manufacturing Company, to the Amended Complaint.

Now comes NIXDORFF-KREIN MANUFACTURING COMPANY, hereinafter sometimes referred to as "THIS RESPONDENT", by Levy, Goldberg & Lawrence, its attorneys, and makes the following answer to the amended complaint heretofore filed by the Federal Trade Commission:

Answering generally the amended complaint, this respondent denies that it has ever been a party to any violation of the provisions of the Federal Trade Commission Act or the Clayton Act, as amended by the Robinson-Patman Act, or any other laws of the United States, as alleged in
528 said complaint.

In so far as any allegation contained in said amended complaint is not hereinafter expressly admitted, this respondent expressly denies every such allegation of which it has knowledge.

Answering specifically the amended complaint, with the paragraphs herein numbered to correspond with the paragraph numbers in said amended complaint, this respondent states as follows:

Answer of Respondent Nixdorff-Krein Manufacturing Company to the Amended Complaint. 529

ANSWER TO COUNT I

1. This respondent denies each allegation contained in paragraph One and particularly denies that this respondent, jointly or severally, violated any provision contained in Section 5 of the Federal Trade Commission Act.

2. This respondent denies each allegation contained in paragraph Two and particularly denies that this respondent has ever combined or conspired to restrain trade and commerce in the sale of chain and chain products among the several States of the United States.

530

3. This respondent admits the allegations contained in sub-paragraphs (1), (12) and (20) of paragraph Three. This respondent further states that Walter S. McCann, the person referred to in sub-paragraph (21) no longer is Secretary or Treasuer of respondent Institute; he having departed this life on May 22, 1945. This respondent, answering sub-paragraph (22), states that William D. Kirkpatrick is not the President of the respondent Institute. This respondent answering sub-paragraph (23), denies that the respondent Frank A. Bond is an official of the respondent Institute in dealing with freight rate matters. This respondent, answering sub-paragraph (24), denies that the respondent George J. Campbell is Vice President of the respondent Institute. This respondent, answering the unnumbered two paragraphs immediately following sub-paragraph (27), states that the respondent Hodell Chain Company is not a member of said Institute; and this respondent denies that it, either individually or jointly, participated in any action of an unlawful nature, whether as charged in said amended complaint or otherwise. As to all other allegations contained in paragraph Three, this respondent has no knowledge and therefore neither admits nor denies the same but demands strict proof thereof.

531

532 *Answer of Respondent Nixdorff-Krein Manufacturing Company to the Amended Complaint.*

4. This respondent, answering paragraph Four of said amended complaint, states that it has no knowledge as to the allegations contained in sub-paragraph (6) thereof and therefore neither admits nor denies the same but demands strict proof thereof. This respondent further answering said paragraph Four of said amended complaint, alleges that it has always been and is now in active and substantial competition with the othe members of the chain industry in making and seeking to make sales of its products in trade and commerce between and among the several States of the United States and in the District of Columbia.

533 5. This respondent denies every allegation contained in paragraph Five and in particular denies that it had any dealings or connection of any kind or nature whatsoever with the respondents, Shirley, Olcott and Nichols, or either of them.

6. This respondent, answering paragraph Six of said amended complaint, states that it is without knowledge as to the allegations therein contained and therefore neither admits nor denies the same but demands strict proof thereof. This respondent further states that the charges outlined in paragraph Six and the allegations expressed therein are nowhere directly charged to this respondent; and this respondent respectfully submits that the inclusion of
534 these charges in this proceeding involving this respondent if included in the trial of this proceeding will involve a most substantial issue, will require the presence of this respondent or its counsel at the hearings thereon, and will therefore unfairly and unnecessarily impose considerable expense and hardship upon this respondent.

7. This respondent, answering paragraph Seven, states that it is without knowledge as to the allegations contained

in said paragraph Seven and therefore neither admits nor denies the same but demands strict proof thereof. This respondent states that the charges and allegations made in support thereof contained in paragraph Seven of said amended complaint do not directly, unless by dubious inference, connect this respondent therewith. This respondent in fact at no time had any dealings or connection of any kind or nature whatsoever with the respondents, Shirley, Olcott and Nichols, or either of them; and this respondent respectfully submits that the inclusion of these charges in this proceeding involving this respondent if included in the trial of this proceeding will involve a most substantial 536
issue, will require the presence of this respondent or its counsel at the hearings thereon, and will therefore unfairly and unnecessarily impose considerable expense and hardship upon this respondent.

8. This respondent, answering paragraph Eight, denies every allegation contained therein.

9. This respondent, answering paragraph Nine, denies that it uses the Basing Point pricing practice or any other system as a device by which to suppress price competition or to deprive its nearby customers of any price advantages which they would under any circumstances enjoy. This respondent further states that the use of a Basing Point in selling or shipping its products is a normal and natural 537
method of sale and distribution which promotes competition in the industry and that its elimination could well result in the establishment of monopolies and monopolistic control by reason of the geographical location of the various respondents' plants, thereby destroying competition and eliminating from the industry those manufacturers whose continuance in business is dependent on their continuing to sell chain products on a delivered price basis. To elimi-

nate a Basing Point might well result in insuring to each respondent a zone where monopolistic powers would prevail. A Basing Point is the natural result of basic economic conditions in the chain industry, is consistent with free and open competition in the industry and does not result in monopolistic control over prices or discriminatory treatment between customers, nor does it constitute an unfair method of competition. This respondent is informed and believes and upon such information and belief states the fact to be that a Basing Point has been used by the industry for more than twenty-five years and is not the result
539 of any combination or agreement, express or implied, between the respondents. Any respondent is at liberty to establish a new pricing system, and the matter of a Basing Point is solely an economic problem and is not an unfair trade practice.

10. This respondent, answering paragraph Ten, denies that this respondent, jointly and severally, uses a freight equalization pricing system or any other system as a device by which to suppress price competition or to deprive its nearby customers of any price advantage which otherwise they would naturally enjoy, or to discriminate against any customers, and further denies that any system utilized by this respondent in fact effects any suppression of price competition or deprivation of price advantages or discrimi-
540 nation against any customer.

11. This respondent, answering paragraph Eleven, denies that it, jointly or severally, uses a Zone Pricing System or any system as a device by which to suppress price competition or deprive nearby customers of any price advantage which they otherwise would naturally enjoy, or to discriminate against any customers; and this respondent further denies that any system used by it has the effect

of suppressing price competition or depriving any customers of price advantages which they would otherwise naturally enjoy, or discriminating against any customers in favor of any other customers, or resulting in any customers being required to pay more than would otherwise be the case. And this respondent states further that the forces of competition have, at all times involved in this proceeding, and do now make and determine the price quotations of this respondent.

12. This respondent, answering paragraph Twelve, denies that the inherent or necessary effect of the adoption and maintenance by this respondent of any price system which it uses is to eliminate price competition in any respect or lessen competition in any respect, or levy additional or arbitrary financial burden, or arbitrarily fix and control any portion of the total cost of the product to any purchaser on any illegitimate basis, or maintain monopolistic or unfair or oppressive discrimination against any purchasers, or levy upon any purchasers increases in net prices. 542

13. This respondent, answering paragraph Thirteen, denies all the allegations therein contained.

ANSWER TO COUNT II 543

1. This respondent denies each allegation contained in paragraph One and particularly denies that this respondent, jointly or severally, violated any provision contained in Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

2. This respondent, answering paragraph Two, denies the allegations therein contained.

3. and 4. This respondent, answering paragraphs Three and Four, does hereby incorporate in full its answer as set forth in paragraphs 3 and 4 of its answer to Count 1 of the amended complaint.

5. This respondent, answering paragraph Five, denies every allegation therein contained.

6. This respondent, answering paragraph Six, denies the allegations therein contained.

7. This respondent, answering paragraph Seven, denies
545 the allegations therein contained.

8. This respondent, answering paragraph Eight, denies the allegations therein contained.

9. This respondent, answering paragraph Nine, denies the allegations therein contained.

10. This respondent, answering paragraph Ten, denies that the inherent or necessary effect of any practice by this respondent is to eliminate price competition or substantially lessen competition, or levy any additional or arbitrary financial burden, or arbitrarily fix or control any portion of the total cost of the product, or maintain monop-
546 olistic or unfair and oppressive discrimination against any purchaser, or levy upon any purchaser increases in any respect illegitimate.

11. This respondent, answering paragraph Eleven, denies the allegations therein contained.

12. This respondent, answering paragraph Twelve, denies the allegations therein contained.

547

WHEREFORE, this respondent having fully answered the amended complaint, prays that it may be dismissed as to it.

Dated: November 26, 1945.

NIXDORFF-KREIN MANUFACTURING COMPANY,

By LEVY, GOLDBERG & LAWRENCE,
Its Attorneys,
209 South LaSalle Street,
Chicago, Illinois,
FRAnklin 3266.

548

Filed November 28, 1945.

Answer of Respondent, Peerless Chain Company, to the Amended Complaint.

Now comes PEERLESS CHAIN COMPANY, hereinafter sometimes referred to as "THIS RESPONDENT", by Levy, Goldberg & Lawrence, its attorneys, and makes the following answer to the amended complaint heretofore filed by the Federal Trade Commission:

549

Answering generally the amended complaint, this respondent denies that it has ever been a party to any violation of the provisions of the Federal Trade Commission Act or the Clayton Act, as amended by the Robinson-Patman Act, or any other laws of the United States, as alleged in said complaint.

In so far as any allegation contained in said amended complaint is not hereinafter expressly admitted, this respondent expressly denies every such allegation of which it has knowledge.

550 *Answer of Respondent Peerless Chain Company to the Amended Complaint.*

Answering specifically the amended complaint, with the paragraphs herein numbered to correspond with the paragraph numbers in said amended complaint, this respondent states as follows:

ANSWER TO COUNT I

1. This respondent denies each allegation contained in paragraph One and particularly denies that this respondent, jointly or severally, violated any provision contained in Section 5 of the Federal Trade Commission Act.

551

2. This respondent denies each allegation contained in paragraph Two and particularly denies that this respondent has ever combined or conspired to restrain trade and commerce in the sale of chain and chain products among the several States of the United States.

3. This respondent admits the allegations contained in sub-paragraphs (1), (13) and (20) of paragraph Three. This respondent further states that Walter S. McCann, the person referred to in sub-paragraph (21) no longer is Secretary or Treasurer of respondent Institute, he having departed this life on May 22, 1945. This respondent, answering sub-paragraph (22), states that William D. Kirk-

552 patrick is not the President of the respondent Institute. This respondent answering sub-paragraph (23), denies that the respondent Frank A. Bond is an official of the respondent Institute in dealing with freight rate matters. This respondent, answering sub-paragraph (24), denies that the respondent George J. Campbell is Vice President of the respondent Institute. This respondent, answering the unnumbered two paragraphs immediately following sub-paragraph (27), states that the respondent Hodell Chain

553

Company is not a member of said Institute; and this respondent denies that it, either individually or jointly, participated in any action of an unlawful nature, whether as charged in said amended complaint or otherwise. As to all other allegations contained in paragraph Three, this respondent has no knowledge and therefore neither admits nor denies the same but demands strict proof thereof.

4. This respondent, answering paragraph Four of said amended complaint, states that it has no knowledge as to the allegations contained in sub-paragraph (6) thereof and therefore neither admits nor denies the same but demands 554
strict proof thereof. This respondent further answering said paragraph Four of said amended complaint, alleges that it has always been and is now in active and substantial competition with the other members of the chain industry in making and seeking to make sales of its products in trade and commerce between and among the several States of the United States and in the District of Columbia.

5. This respondent denies every allegation contained in paragraph Five and in particular denies that it had any dealings or connection of any kind or nature whatsoever with the respondents, Shirley, Olcott and Nichols, or either of them.

6. This respondent, answering paragraph Six of said 555
amended complaint, states that it is without knowledge as to the allegations therein contained and therefore neither admits nor denies the same but demands strict proof thereof. This respondent further states that the charges outlined in paragraph Six and the allegations expressed therein are nowhere directly charged to this respondent; and this respondent respectfully submits that the inclusion of these charges in this proceeding involving this respond-

ent if included in the trial of this proceeding will involve a most substantial issue, will require the presence of this respondent or its counsel at the hearings thereon, and will therefore unfairly and unnecessarily impose considerable expense and hardship upon this respondent.

7. This respondent, answering paragraph Seven, states that it is without knowledge as to the allegations contained in said paragraph Seven and therefore neither admits nor denies the same but demands strict proof thereof. This respondent states that the charges and allegations made in support thereof contained in paragraph Seven of said
557 amended complaint do not directly, unless by dubious inference, connect this respondent therewith. This respondent in fact at no time had any dealings or connection of any kind or nature whatsoever with the respondents, Shirley, Olcott and Nichols, or either of them; and this respondent respectfully submits that the inclusion of these charges in this proceeding involving this respondent if included in the trial of this proceeding will involve a most substantial issue, will require the presence of this respondent or its counsel at the hearings thereon, and will therefore unfairly and unnecessarily impose considerable expense and hardship upon this respondent.

8. This respondent, answering paragraph Eight, denies
558 every allegation contained therein.

9. This respondent, answering paragraph Nine, denies that it uses the Basing Point pricing practice or any other system as a device by which to suppress price competition or to deprive its nearby customers of any price advantages which they would under any circumstances enjoy. This respondent further states that the use of a Basing Point in selling or shipping its products is a normal and natural method of sale and distribution which promotes competition

in the industry and that its elimination could well result in the establishment of monopolies and monopolistic control by reason of the geographical location of the various respondents' plants, thereby destroying competition and eliminating from the industry those manufacturers whose continuance in business is dependent on their continuing to sell chain products on a delivered price basis. To eliminate a Basing Point might well result in insuring to each respondent a zone where monopolistic powers would prevail. A Basing Point is the natural result of basic economic conditions in the chain industry, is consistent with free and open competition in the industry and does not result in 560 monopolistic control over prices or discriminatory treatment between customers, nor does it constitute an unfair method of competition. This respondent is informed and believes and upon such information and belief states the fact to be that a Basing Point has been used by the industry for more than twenty-five years and is not the result of any combination or agreement, express or implied, between the respondents. Any respondent is at liberty to establish a new pricing system, and the matter of a Basing Point is solely an economic problem and is not an unfair trade practice.

10. This respondent, answering paragraph Ten, denies that this respondent, jointly and severally, uses a freight equalization pricing system or any other system as a device 561 by which to suppress price competition or to deprive its nearby customers of any price advantage which otherwise they would naturally enjoy, or to discriminate against any customers, and further denies that any system utilized by this respondent in fact effects any suppression of price competition or deprivation of price advantages or discrimination against any customer.

11. This respondent, answering paragraph Eleven, denies that it, jointly or severally, uses a Zone Pricing System or any system as a device by which to suppress price competition or deprive nearby customers of any price advantage which they otherwise would naturally enjoy, or to discriminate against any customers; and this respondent further denies that any system used by it has the effect of suppressing price competition or depriving any customers of price advantages which they would otherwise naturally enjoy, or discriminating against any customers in favor of any other customers, or resulting in any customers being required to pay more than would otherwise be the case. And this respondent states further that the forces of competition have, at all times involved in this proceeding, and do now make and determine the price quotations of this respondent.

12. This respondent, answering paragraph Twelve, denies that the inherent or necessary effect of the adoption and maintenance by this respondent of any price system which it uses is to eliminate price competition in any respect or lessen competition in any respect, or levy additional or arbitrary financial burden, or arbitrarily fix and control any portion of the total cost of the product to any purchaser on any illegitimate basis, or maintain monopolistic or unfair or oppressive discrimination against any purchasers, or levy upon any purchasers increases in net prices.

13. This respondent, answering paragraph Thirteen, denies all the allegations therein contained.

Answer of Respondent Peerless Chain Company to the Amended Complaint. 565

ANSWER TO COUNT II.

1. This respondent denies each allegation contained in paragraph One and particularly denies that this respondent, jointly or severally, violated any provision contained in Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

2. This respondent, answering paragraph Two, denies the allegations therein contained.

3 and 4. This respondent, answering paragraphs Three and Four, does hereby incorporate in full its answer as 566
set forth in paragraphs 3 and 4 of its answer to Count I of the amended complaint.

5. This respondent, answering paragraph Five, denies every allegation therein contained.

6. This respondent, answering paragraph Six, denies the allegations therein contained.

7. This respondent, answering paragraph Seven, denies the allegations therein contained.

8. This respondent, answering paragraph Eight, denies the allegations therein contained.

567

9. This respondent, answering paragraph Nine, denies the allegations therein contained.

10. This respondent, answering paragraph Ten denies that the inherent or necessary effect of any practice by this respondent is to eliminate price competition or substantially lessen competition, or levy any additional or arbitrary financial burden, or arbitrarily fix or control any

568 *Answer of Respondent Peerless Chain Company to the Amended Complaint.*

portion of the total cost of the product, or maintain monopolistic or unfair and oppressive discrimination against any purchaser, or levy upon any purchaser increases in any respect illegitimate.

11. This respondent, answering paragraph Eleven, denies the allegations therein contained.

12. This respondent, answering paragraph Twelve, denies the allegations therein contained.

569 WHEREFORE, this respondent, having fully answered the amended complaint, prays that it may be dismissed as to it.

Dated: November 26, 1945.

PEERLESS CHAIN COMPANY,
By LEVY, GOLDBERG & LAWRENCE,
Its Attorneys,
209 S. La Salle Street,
Chicago, Illinois,
FRanklin 3266.

Filed November 28, 1945.

570

571

Letter to Federal Trade Commission.

Oct. 27th 1945

The Federal Trade Commission
6th & Constitutional Ave.
Washington, D. C.

Re: Docket No. 4878

In the Matter of Chain Institute Inc.

Gentlemen:

This is to acknowledge your Secretary's Mr. Otis B. Johnson's notice of Oct. 9th of the above Docket Complaint and also please find return receipt card covering your recent order extending time for filing answers to Nov. 28th, 1945. 572

I have again most carefully reviewed the twenty-three pages contained in the complaint and sincerely hope the following answers will have your full consideration and your final approval.

First, I must ask the Commission to consider that although my Company is a Dues paying member of the Chain Institute, that it has only had occasion to associate with the minor part of the Institute's members or Group, namely the Sash Chain Group, and that my Company's or my personal association has not at any time or in any way been connected or involved with the activities of the major Welded and Tire Chain Group. The above fact is only obviously natural inasmuch as we do not make those above types of chain products. 573

Second, I continued my Company's membership in the Chain Institute after the abolition of the National Recovery Act, because of the very necessary standardization work

perfaining to sizes and gauges of chain particularly from the standpoint of the desire for simplification and conservation. Real strides along these lines, we are pleased to be able to say, have been accomplished to the mutual interest of both the manufacturers and public. This proved to be most worth while and generally helpful to our Government and its armed forces during the war.

Also as a result of our membership in the Institute, there has been the opportunity to call our Government's attention to any foreign dumping into this Country of our types of chain and thus a united action for protection against this form of unfair and disasfrous competition.

575 I have not nor has any other member of my Company attended a Chain Institute Meeting during the past three years and prior to that time, our small Chain Group had no regular time for meetings, and those few meetings that have been held were for the above said purpose of standardization, and the promoting by united effort thru advertising the ways of using our products as well as the advantages of same and not for the purpose of price and terms sales fixing.

Third, There is no opportunity for the manufacturer of this small line of chain to become monopolistic and profiteering as there are too many competitive products such as cord, rope, cable, and many other types of competitive chains
576 that we do not make that are and can be used as substitutes for our limited line of chain.

Fourth, My Company has always depended on our sales connections and customers to keep us informed as to our principal competitor's prices. It has always been with us a case of having to try to meet competition and our slim margin of profit over the years is the clearest possible truth to the fact that there could never be any monopolistic or abusive activities by this company.

Fifth, As for equalization of freight, we can only say, we never knew there was any law against following a competitor's practice on this subject, and as there is such a limited use of our types of chain that if we do not have a chance to sell the whole nation, we would not have volume of business to manufacture as economically as we have been able to and can therefore assure the Commission that instead of even the nearest customer to our factory being penalized, he would have been paying considerably higher prices comparably, or we would not have been able to remain in business. In the case of any system, of freight equalization we have been using as near an all around most fair method to all concerned that we honestly believe 578
possible and have at no time, charged a customer for any freight transportation cost that did not constitute at least a part of the actual cost of delivery to him.

Sixth, My Company has to my best knowledge always operated strictly in accordance with the Robinson Patman Act and in my understanding of said Act, has always believed it to be a good Act for business.

Seventh, My Company, nor I had never before heard of the concern of Shirley, Olcott & Nichols until the complaint issued against my Company had been received.

Eighth, My Company has never unfairly discriminated knowingly or intentionally against anybody, including the 579
United States Government but does feel that the Federal Trade Commission if they are not willing to excuse us from this complaint are definitely discriminating against this rather helplessly small company by first having publicly permitted wide newspaper publication of a charge of conspiracy against its government before first having even been notified that such a charge was to be made or before giving us a chance whatever to answer the charge, and next, there

are six or seven other chain manufacturers who make the same small chains that we do, that no complaint we find has been filed against.

Ninth, Upon contacting Mr. Kirkpatrick, Vice President of the respondent American Chain & Cable Co., as to how he could account for my Company being involved in this complaint, he stated "It is cruel that either the John M. Russell Mfg. Co or the Turner & Seymour Mfg. Co. be included in this complaint."

In view of the above as a whole, I certainly do not want to expend my Co.'s meagre and already vanishing funds for
581 lawyer's fees nor to sacrifice any more of my health, energy and time from my job which already requires continual overtime in the taking care of production, planning, sales, purchasing, employing, engineering, and a hundred and one other jobs including the present increasing demands of our employees for increased wages despite time and one half pay, numerous advances made them over the past few years, and without consideration by them of the fact our selling prices for products they are daily making have been frozen since early 1942, all boils down to the management of this business being already burdened to the extent of human endurance in trying to keep afloat this small business employing less than forty individuals.

In truth, my Company has not actively participated in
582 any business association or the Chain Institute, since the original complaint was made by the F. T. C. in 1943. Although for the sake of patriotism, I have felt it advisable to have my Company remain a member of the Institute for the duration of the war, so a coordinated effort could best be brought forth in the aid of our nation in the defeat of our enemies. I have as a result of such constructive effort in standardization and elimination of waste in our Chain Group been appointed a member of the Weldless

Chain Division of the War Production Board and on this past Thursday, Oct. 25th, was presented with a Certificate from the War Production Board in recognition as stated of "his time, judgment, and experience and for loyal service to the war effort."

I can mostly attribute the above personal recognition to the fact that there has been constructive work accomplished as a result of my association as a member of the Small Group of the Chain Institute. And in conclusion, trust that you will favorably act on this response and spare my Company and myself any further injustices with the understanding that I will see to it that the John M. Russell Mfg. Co. of Naugatuck, Conn., will cease and desist from further 584 membership in the Chain Institute if that is what you wish.

Yours very truly,

THE JOHN M. RUSSELL MFG. CO.
THEO. RUSSELL,
President.

TR

(Filed November 27, 1945.)

585

586

Answer of Respondent The Turner and Seymour Manufacturing Company.

The Respondent, THE TURNER AND SEYMOUR MANUFACTURING COMPANY, (sometimes hereinafter referred to as Turner) by Marsh, Day & Calhoun, its attorneys, makes the following answer to the amended complaint of the Federal Trade Commission, dated October 9, 1945:

ANSWER TO COUNT I

1. Turner denies Paragraph One of Count I.

2. Turner denies Paragraph Two of Count I.

587 3. With respect to Paragraph Three of Count I, Turner admits sub-paragraphs (1) and (17) and that it is a member of Respondent Chain Institute, Inc. Turner is without knowledge or information sufficient to form a belief with respect to the allegations of sub-paragraphs (2) to (16) inclusive and (18) to (27) inclusive. Turner denies each and all the other allegations of said Paragraph Three.

4. With respect to Paragraph Four of Count I, Turner neither manufactures nor sells Welded Chains or Tire Chains and is without knowledge or information sufficient to form a belief with respect to any of the allegations concerning Welded Chains or Tire Chains. Turner admits that Weldless Chain as such is not a patented article and
588 that it ships and sells the Weldless Chain manufactured by it in interstate commerce.

Turner has been at all times mentioned in the amended complaint and now is in active and substantial competition with such other members of the Chain Industry and with such of the other Respondent Members as have manufactured and sold or do now manufacture and sell Weldless Chain of the types manufactured and sold by Turner in making and seeking to make sales of such chain in interstate

commerce. Turner denies any allegation, whether of fact or inference, contained in said Paragraph Four to the effect that such active and substantial competition does not continue or has been adversely affected by the use of any acts, methods, practices and policies referred to in said paragraph.

Turner denies each and all the other allegations of said Paragraph Four.

5. Turner denies Paragraph Five of Count I and specifically denies that it has ever had any dealings or connections of any sort or description with respondents Shirley, Olcott and Nichols.

6. With respect to Paragraph Six of Count I, Turner neither manufactures nor sells tire chains and did not manufacture or sell tire chains at any time mentioned in the amended complaint and Turner denies any knowledge with respect to the allegations contained in said Paragraph Six. Turner is in doubt as to whether any of the allegations contained in said Paragraph Six are intended to refer to it, but if any of said allegations are intended to refer to Turner such allegations with respect to Turner are untrue and are denied.

7. With respect to Paragraph Seven of Count I, Turner neither manufactures nor sells tire chains and did not manufacture or sell tire chains at any time mentioned in the amended complaint. Turner denies each and every allegation contained in said Paragraph Seven insofar as they may be intended or construed to apply to Turner and further denies that it has ever had any dealings or connections of any sort or description with respondents Shirley, Olcott and Nichols.

592 *Answer of Respondent The Turner and Seymour Manufacturing Company.*

8. Turner denies Paragraph Eight of Count 1.

9. With respect to Paragraph Nine of Count 1, Turner neither manufactures nor sells Welded Chain and did not manufacture or sell Welded Chain at any time mentioned in the amended complaint and Turner denies any knowledge with respect to the allegations contained in said Paragraph Nine. Turner is in doubt as to whether any of the allegations contained in said Paragraph Nine are intended to refer to it, but if any of said allegations are intended to refer to Turner such allegations with respect to Turner are
593 untrue and are denied.

10. With respect to Paragraph Ten of Count 1, Turner in selling the Weldless Chain manufactured by it, has for many years and does now sell its chain at list prices (less discount) F.O.B. Torrington, Connecticut, the place of manufacture, with freight equalized with that one of the following points, i.e. Bridgeport, Conn., York, Pennsylvania or Cleveland, Ohio, which is nearest to the specified transportation terminal of said shipment. For example, on an order from a customer in St. Louis, Missouri for Weldless Chain Turner ships the chain F.O.B. Torrington, Connecticut, transportation collect, and shows a credit on invoice to the customer of the difference between the freight rate on steel chain from Torrington, Conn., to St. Louis, Missouri,
594 and the rate from Cleveland, Ohio to St. Louis, Missouri. If the customer picks up the chain from St. Louis warehouse he is billed list, less discount, plus the freight rate from Cleveland the nearest equalization point to St. Louis, Missouri.

This pricing method has been and is used by Turner, except in sales of Weldless Chain to customers located in the five Boroughs of New York City and in the cities of Newark

and Hoboken, New Jersey to which places the chain is delivered.

Turner also delivers to its customers at or near its place of manufacture.

The aforesaid pricing method was adopted by Turner independent of any of the other Respondents or any other person, was adopted to meet competition and permits Turner to compete in the sale of chain in places where it could not otherwise compete.

Except as hereinabove expressly admitted Turner denies said Paragraph Ten. 596

11. Turner does not manufacture or sell tire chains and therefore denies Paragraph Eleven of Count I.

12. Turner denies Paragraph Twelve of Count I.

Turner further avers that the pricing method used by it as described in paragraph ten of this Answer has been in use in the chain industry and in other industries for many years and was in use by its competitors in the sale of Weldless Chain when Turner commenced the manufacture and sale of competitive weldless chain and chain parts. Turner avers that it adopted this method of pricing in order that it might compete in the sale of Weldless Chain; and asserts that such pricing method is a normal and natural method of 597
sale and distribution which promotes competition in the industry, does not result in monopolistic control over prices or discriminatory treatment between customers and does not constitute an unfair method of competition. Turner further avers that to order it to cease to use this method of pricing would lessen competition and would not be in the public interest.

598 *Answer of Respondent The Turner and Seymour Manufacturing Company.*

13. Turner denies Paragraph 13 of Count I.

1-13. Turner denies that it individually, jointly; or in any manner in connection with any of the other respondents named in the amended complaint, or with any others, has violated any of the provisions of Section 5 of the Federal Trade Commission Act.

WHEREFORE, Turner, having fully answered Count 1 of the amended complaint herein prays that said Count 1 against it be dismissed.

599

ANSWER TO COUNT II.

1. Turner denies Paragraph One of Count II.

2. Turner denies Paragraph Two of Count II.

3. Paragraph Three of this Answer to Count I is hereby made the answer to Paragraph Three of Count II.

4. Paragraph four of this Answer to Count I is hereby made the answer to Paragraph Four of Count II.

5. Turner denies Paragraph Five of Count II.

600 6. Turner denies Paragraph Six of Count II.

7. With respect to Paragraph Seven of Count II Turner is not engaged in the sale of Welded Chain and was not so engaged at any time mentioned in said Paragraph Seven.

Turner denies Paragraph Seven of Count II and hereby makes and incorporates Paragraph Ten of this Answer to Count I as a part of its answer to said Paragraph Seven.

8. Turner denies Paragraph Eight of Count II.

9. Turner denies Paragraph Nine of Count II.

10. Turner denies Paragraph Ten of Count II.

11. Turner denies Paragraph Eleven of Count II and hereby makes and incorporates Paragraph Twelve of this Answer to Count I as a part of its answer to said Paragraph Eleven.

12. Turner denies Paragraph Twelve of Count II.

602

1-12. Turner denies that it has in any way violated any of the provisions of Section 2 of the Clayton Act as amended by the Robinson Patman Act.

Wherefore, Turner, having fully answered Count II of the amended complaint herein prays that said Count II against it be dismissed.

The Turner and Seymour Manufacturing Company,

By Marsh, Day & Calhoun,
Its Attorneys,
Office and Post Office Address,
886 Main Street,
Bridgeport, Connecticut. 603

Dated: November 15, 1945.

Filed November 27, 1945.

604

Answer of Respondent, Western Chain Products Company, to the Amended Complaint.

Now comes WESTERN CHAIN PRODUCTS COMPANY, hereinafter sometimes referred to as "THIS RESPONDENT", by Levy, Goldberg & Lawrence, its attorneys, and makes the following answer to the amended complaint heretofore filed herein by the Federal Trade Commission:

Answering generally the amended complaint, this respondent denies that it has ever been a party to any violation of the provisions of the Federal Trade Commission Act or the Clayton Act, as amended by the Robinson-Patman Act, or any other laws of the United States, as al
605 leged in said complaint.

In so far as any allegation contained in said amended complaint is not hereinafter expressly admitted, this respondent expressly denies every such allegation of which it has knowledge.

Answering specifically the amended complaint, with the paragraphs herein numbered to correspond with the paragraph numbers in said amended complaint, this respondent states as follows:

ANSWER TO COUNT I

1. This respondent denies each allegation contained in
606 paragraph One and particularly denies that this respondent, jointly or severally, violated any provision contained in Section 5 of the Federal Trade Commission Act.

2. This respondent denies each allegation contained in paragraph Two and particularly denies that this respondent has ever combined or conspired to restrain trade and commerce in the sale of chain and chain products among the several States of the United States.

3. This respondent admits the allegations contained in sub-paragraphs (1), (18) and (20) of paragraph Three. This respondent further states that Walter S. McCann, the person referred to in sub-paragraph (21) no longer is Secretary or Treasurer of respondent Institute, he having departed this life on May 22, 1945. This respondent, answering sub-paragraph (22), states that William D. Kirkpatrick is not the President of the respondent Institute. This respondent answering sub-paragraph (23), denies that the respondent Frank A. Bond is an official of the respondent Institute in dealing with freight rate matters. This respondent, answering sub-paragraph (24), denies that the 608
respondent George J. Campbell is Vice President of the respondent Institute. This respondent, answering the unnumbered two paragraphs immediately following sub-paragraph (27), states that the respondent Hodell Chain Company is not a member of said Institute; and this respondent denies that it, either individually or jointly, participated in any action of an unlawful nature, whether as charged in said amended complaint or otherwise. As to all other allegations contained in paragraph Three, this respondent has no knowledge and therefore neither admits nor denies the same but demands strict proof thereof.

4. This respondent, answering paragraph Four of said amended complaint, states that it has no knowledge as to the allegations contained in sub-paragraph (6) thereof and therefore neither admits nor denies the same but demands 609
strict proof thereof. This respondent further answering said paragraph Four of said amended complaint, alleges that it has always been and is now in active and substantial competition with the other members of the chain industry in making and seeking to make sales of its products in trade and commerce between and among the several States of the United States and in the District of Columbia.

nswer of Respondent Western Chain Products Company to the Amended Complaint.

5. This respondent denies every allegation contained in aragraph Five and in particular denies that it had any ealings or connection of any kind or nature whatsoever ith the respondents, Shirley, Olcott and Nichols, or either f them.

6. This respondent, answering paragraph Six of said nended complaint, states that it is without knowledge as the allegations therein contained and therefore neither mits nor denies the same but demands strict proof ereof. This respondent further states that the charges tlined in paragraph Six and the allegations expressed erein are nowhere directly charged to this respondent; nd this respondent respectfully submits that the inclusion f these charges in this proceeding involving this respond- nt if included in the trial of this proceeding will involve a ost substantial issue, will require the presence of this spondent or its counsel at the hearings thereon, and will erefore unfairly and unnecessarily impose considerable pense and hardship upon this respondent.

7. This respondent, answering paragraph Seven, states at it is without knowledge as to the allegations contained said paragraph Seven and therefore neither admits nor nies the same but demands strict proof thereof. This spondent states that the charges and allegations made in port thereof contained in paragraph Seven of said nended complaint do not directly, unless by dubious in- rence, connect this respondent therewith. This respond- t in fact at no time had any dealings or connection of any nd or nature whatsoever with the respondents, Shirley, otf and Nichols, or either of them; and this respondent spectfully submits that the inclusion of these charges in s proceeding involving this respondent if included in the al of this proceeding will involve a most substantial issue, l require the presence of this respondent or its counsel

at the hearings thereon, and will therefore unfairly and unnecessarily impose considerable expense and hardship upon this respondent.

8. This respondent, answering paragraph Eight, denies every allegation contained therein.

9. This respondent, answering paragraph Nine, denies that it uses the Basing Point pricing practice or any other system as a device by which to suppress price competition or to deprive its nearby customers of any price advantages which they would under any circumstances enjoy. This respondent further states that the use of a Basing Point in 614
selling or shipping its products is a normal and natural method of sale and distribution which promotes competition in the industry and that its elimination could well result in the establishment of monopolies and monopolistic control by reason of the geographical location of the various respondents' plants, thereby destroying competition and eliminating from the industry those manufacturers whose continuance in business is dependent on their continuing to sell chain products on a delivered price basis. To eliminate a Basing Point might well result in insuring to each respondent a zone where monopolistic powers would prevail. A Basing Point is the natural result of basic economic conditions in the chain industry, is consistent with free and open competition in the industry and does not result in monopolistic control over prices or discriminatory 615
treatment between customers, nor does it constitute an unfair method of competition. This respondent is informed and believes and upon such information and belief states the fact to be that a Basing Point has been used by the industry for more than twenty-five years and is not the result of any combination or agreement, express or implied, between the respondents. Any respondent is at liberty to establish a new pricing system, and the matter of a Basing

616 *Answer of Respondent Western Chain Products Company to the Amended Complaint.*

Point is solely an economic problem and is not an unfair trade practice.

10. This respondent, answering paragraph Ten, denies that this respondent, jointly and severally, uses a freight equalization pricing system or any other system as a device by which to suppress price competition or to deprive its nearby customers of any price advantage which otherwise they would naturally enjoy, or to discriminate against any customers, and further denies that any system utilized by this respondent in fact effects any suppression of price competition or deprivation of price advantages or discrimi-
617 nation against any customer.

11. This respondent, answering paragraph Eleven, denies that it, jointly or severally, uses a Zone Pricing System or any system as a device by which to suppress price competition or deprive nearby customers of any price advantage which they otherwise would naturally enjoy, or to discriminate against any customers; and this respondent further denies that any system used by it has the effect of suppressing price competition or depriving any customers of price advantages which they would otherwise naturally enjoy, or discriminating against any customers in favor of any other customers, or resulting in any customers being required to pay more than would otherwise be the case. And this respondent states further that the
618 forces of competition have, at all times involved in this proceeding, and do now make and determine the price quotations of this respondent.

12. This respondent, answering paragraph Twelve, denies that the inherent or necessary effect of the adoption and maintenance by this respondent of any price system which it uses is to eliminate price competition in any respect or lessen competition in any respect, or levy additional or arbitrary financial burden, or arbitrarily fix and

control any portion of the total cost of the product to any purchaser on any illegitimate basis, or maintain monopolistic or unfair or oppressive discrimination against any purchasers, or levy upon any purchasers increases in net prices.

13. This respondent, answering paragraph Thirteen, denies all the allegations therein contained.

ANSWER TO COUNT II

1. This respondent denies each allegation contained in paragraph One and particularly denies that this respondent, jointly or severally, violated any provision contained in Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. 620

2. This respondent, answering paragraph Two, denies the allegations therein contained.

3 and 4. This respondent, answering paragraphs Three and Four, does hereby incorporate in full its answer as set forth in paragraphs 3 and 4 of its answer to Count I of the amended complaint.

5. This respondent, answering paragraph Five, denies every allegation therein contained. 621

6. This respondent, answering paragraph Six, denies the allegations therein contained.

7. This respondent, answering paragraph Seven, denies the allegations therein contained.

8. This respondent, answering paragraph Eight, denies the allegations therein contained.

622 *Answer of Respondent Western Chain Products Company to the Amended Complaint.*

9. This respondent, answering paragraph Nine, denies the allegations therein contained.

10. This respondent, answering paragraph Ten, denies that the inherent or necessary effect of any practice by this respondent is to eliminate price competition or substantially lessen competition, or levy any additional or arbitrary financial burden, or arbitrarily fix or control any portion of the total cost of the product, or maintain monopolistic or unfair and oppressive discrimination against any purchaser, or levy upon any purchaser in-
623 creases in any respect illegitimate.

11. This respondent, answering paragraph Eleven, denies the allegations therein contained.

12. This respondent, answering paragraph Twelve, denies the allegations therein contained.

WHEREFORE, this respondent, having fully answered the amended complaint, prays that it may be dismissed as to it.

Dated: November 26, 1945.

WESTERN CHAIN PRODUCTS COMPANY,

624 By LEVY, GOLDBERG & LAWRENCE,
Its Attorneys,
209 South LaSalle Street,
Chicago, Illinois,
FRAnklin 3266.

Filed November 28, 1945.

625

Answer of Respondent, Woodhouse Chain Works, to the Amended Complaint.

Now comes WOODHOUSE CHAIN WORKS, hereinafter sometimes referred to as "THIS RESPONDENT", by Levy, Goldberg & Lawrence, its attorneys, and makes the following answer to the amended complaint heretofore filed by the Federal Trade Commission:

Answering generally the amended complaint, this respondent denies that it has ever been a party to any violation of the provisions of the Federal Trade Commission Act or the Clayton Act, as amended by the Robinson-Patman Act, or any other laws of the United States, as alleged in said complaint.

626

In so far as any allegation contained in said amended complaint is not hereinafter expressly admitted, this respondent expressly denies every such allegation of which it has knowledge.

Answering specifically the amended complaint, with the paragraphs herein numbered to correspond with the paragraph numbers in said amended complaint, this respondent states as follows:

ANSWER TO COUNT I

1. This respondent denies each allegation contained in paragraph One and particularly denies that this respondent, jointly or severally, violated any provision contained in Section 5 of the Federal Trade Commission Act.

627

2. This respondent denies each allegation contained in paragraph Two and particularly denies that this respondent has ever combined or conspired to restrain trade and commerce in the sale of chain and chain products among the several States of the United States.

628 *Answer of Respondent Woodhouse Chain Works to the Amended Complaint.*

3. This respondent admits the allegations contained in sub-paragraphs (1), (19) and (20) of paragraph Three. This respondent further states that Walter S. McCann, the person referred to in sub-paragraph (21) no longer is Secretary or Treasurer of respondent Institute, he having departed this life on May 22, 1945. This respondent, answering sub-paragraph (22), states that William D. Kirkpatrick is not the President of the respondent Institute. This respondent answering sub-paragraph (23), denies that the respondent Frank A. Bond is an official of the respondent Institute in dealing with freight rate matters.
629 This respondent, answering sub-paragraph (24), denies that the respondent George J. Campbell is Vice President of the respondent Institute. This respondent, answering the unnumbered two paragraphs immediately following sub-paragraph (27), states that the respondent Hodell Chain Company is not a member of said Institute; and this respondent denies that it, either individually or jointly, participated in any action of an unlawful nature, whether as charged in said amended complaint or otherwise. As to all other allegations contained in paragraph Three, this respondent has no knowledge and therefore neither admits nor denies the same but demands strict proof thereof.

4. This respondent, answering paragraph Four of said amended complaint, states that it has no knowledge as to
630 the allegations contained in sub-paragraph (6) thereof and therefore neither admits nor denies the same but demands strict proof thereof. This respondent further answering said paragraph Four of said amended complaint, alleges that it has always been and is now in active and substantial competition with the other members of the chain industry in making and seeking to make sales of its products in trade and commerce between and among the several States of the United States and in the District of Columbia.

Answer of Respondent Woodhouse Chain Works to the Amended Complaint. 631

5. This respondent denies every allegation contained in paragraph Five and in particular denies that it had any dealings or connection of any kind or nature whatsoever with the respondents, Shirley, Olcott and Nichols, or either of them.

6. This respondent, answering paragraph Six of said amended complaint, states that it is without knowledge as to the allegations therein contained and therefore neither admits nor denies the same but demands strict proof thereof. This respondent further states that the charges outlined in paragraph Six and the allegations expressed 632
therein are nowhere directly charged to this respondent; and this respondent respectfully submits that the inclusion of these charges in this proceeding involving this respondent if included in the trial of this proceeding will involve a most substantial issue, will require the presence of this respondent or its counsel at the hearings thereon, and will therefore unfairly and unnecessarily impose considerable expense and hardship upon this respondent.

7. This respondent, answering paragraph Seven, states that it is without knowledge as to the allegations contained in said paragraph Seven and therefore neither admits nor denies the same but demands strict proof thereof. This respondent states that the charges and allegations made in support thereof contained in paragraph Seven of said 633
amended complaint do not directly, unless by dubious inference, connect this respondent therewith. This respondent in fact at no time had any dealings or connection of any kind or nature whatsoever with the respondents, Shirley, Olcott and Nichols, or either of them; and this respondent respectfully submits that the inclusion of these charges in this proceeding involving this respondent if included in the trial of this proceeding will involve a most substantial

issue, will require the presence of this respondent or its counsel at the hearings thereon, and will therefore unfairly and unnecessarily impose considerable expense and hard ship upon this respondent.

8. This respondent, answering paragraph Eight, denies every allegation contained therein.

9. This respondent, answering paragraph Nine, denies that it uses the Basing Point pricing practice or any other system as a device by which to suppress price competition or to deprive its nearby customers of any price advantages
635 which they would under any circumstances enjoy. This respondent further states that the use of a Basing Point in selling or shipping its products is a normal and natural method of sale and distribution which promotes competition in the industry and that its elimination could well result in the establishment of monopolies and monopolistic control by reason of the geographical location of the various respondents' plants, thereby destroying competition and eliminating from the industry those manufacturers whose continuance in business is dependent on their continuing to sell chain products on a delivered price basis. To eliminate a Basing Point might well result in insuring to each respondent a zone where monopolistic powers would prevail. A Basing Point is the natural result of basic eco-
636 nomic conditions in the chain industry, is consistent with free and open competition in the industry and does not result in monopolistic control over prices or discriminatory treatment between customers, nor does it constitute an unfair method of competition. This respondent is informed and believes and upon such information and belief states the fact to be that a Basing Point has been used by the industry for more than twenty-five years and is not the result of any combination or agreement, express or im-

plied, between the respondents. Any respondent is at liberty to establish a new pricing system, and the matter of a Basing Point is solely an economic problem and is not an unfair trade practice.

10. This respondent, answering paragraph Ten, denies that this respondent, jointly and severally, uses a freight equalization pricing system or any other system as a device by which to suppress price competition or to deprive its nearby customers of any price advantage which otherwise they would naturally enjoy, or to discriminate against any customers, and further denies that any system utilized by 638
this respondent in fact effects any suppression of price competition or deprivation of price advantages or discrimination against any customer.

11. This respondent, answering paragraph Eleven, denies that it, jointly or severally, uses a Zone Pricing System or any system as a device by which to suppress price competition or deprive nearby customers of any price advantage which they otherwise would naturally enjoy, or to discriminate against any customers; and this respondent further denies that any system used by it has the effect of suppressing price competition or depriving any customers of price advantages which they would otherwise naturally enjoy, or discriminating against any customers in favor of any other customers, or resulting in any cus- 639
tomers being required to pay more than would otherwise be the case. And this respondent states further that the forces of competition have, at all times involved in this proceeding, and do now make and determine the price quotations of this respondent.

12. This respondent, answering paragraph Twelve, denies that the inherent or necessary effect of the adoption

and maintenance by this respondent of any price system which it uses is to eliminate price competition in any respect or lessen competition in any respect, or levy additional or arbitrary financial burden, or arbitrarily fix and control any portion of the total cost of the product to any purchaser on any illegitimate basis, or maintain monopolistic or unfair or oppressive discrimination against any purchasers, or levy upon any purchasers increases in net prices.

13. This respondent, answering paragraph Thirteen, de-
641 nies all the allegations therein contained.

ANSWER TO COUNT II

1. This respondent denies each allegation contained in paragraph One and particularly denies that this respondent, jointly or severally, violated any provision contained in Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

2. This respondent, answering paragraph Two, denies the allegations therein contained.

3 and 4. This respondent, answering paragraphs Three and Four, does hereby incorporate in full its answer as set forth in paragraphs 3 and 4 of its answer to Count I of
642 the amended complaint.

5. This respondent, answering paragraph Five, denies every allegation therein contained.

6. This respondent, answering paragraph Six, denies the allegations therein contained.

7. This respondent, answering paragraph Seven, denies the allegations therein contained.

Answer of Respondent Woodhouse Chain Works to the Amended Complaint. 643

8. This respondent, answering paragraph Eight, denies the allegations therein contained.

9. This respondent, answering paragraph Nine, denies the allegations therein contained.

10. This respondent, answering paragraph Ten denies that the inherent or necessary effect of any practice by this respondent is to eliminate price competition or substantially lessen competition, or levy any additional or arbitrary financial burden, or arbitrarily fix or control any portion of the total cost of the product, or maintain monopolistic or unfair and oppressive discrimination against any purchaser, or levy upon any purchaser increases in any respect illegitimate. 644

11. This respondent, answering paragraph Eleven, denies the allegations therein contained.

12. This respondent, answering paragraph Twelve, denies the allegations therein contained.

Wherefore, this respondent having fully answered the amended complaint, prays that it may be dismissed as to it.

Dated: November 26, 1945.

645

Woodhouse Chain Works,

By Levy, Goldberg & Lawrence,
Its Attorneys,
209 S. La Salle Street,
Chicago, Illinois,
FRAnklin 3266.

Filed November 28, 1945.

646

Answer of Respondent, Dennis A. Merriman, to Amended Complaint.

Now comes DENNIS A. MERRIMAN, hereinafter sometimes referred to as "THIS RESPONDENT", by Levy, Goldberg & Lawrence, his attorneys, and makes the following answer to the amended complaint heretofore filed herein by the Federal Trade Commission:

Answering generally the amended complaint, this respondent denies that he has ever been a party to any violation of the provisions of the Federal Trade Commission Act or the Clayton Act, as amended by the Robinson-Patman Act or any other laws of the United States, as alleged
647 in said complaint.

In so far as any allegation contained in said amended complaint is not hereinafter expressly admitted, this respondent expressly denies every such allegation of which he has knowledge.

Answering specifically the amended complaint, with the paragraphs herein numbered to correspond with the paragraph numbers in said amended complaint, this respondent states as follows:

ANSWER TO COUNT I

1. This respondent denies each allegation contained in paragraph One and particularly denies that this respond-
648 ent, jointly or severally, violated any provision contained in Section 5 of the Federal Trade Commission Act.

2. This respondent denies each allegation contained in paragraph Two and particularly denies that this respondent has ever combined or conspired to restrain trade and commerce in the sale of chain and chain products among the several States of the United States.

Answer of Respondent Dennis A. Merriman to Amended Complaint. 649

3. This respondent admits that he is Managing Director of the respondent Chain Institute, Inc. This respondent further states that Walter S. McCann, the person referred to in sub-paragraph (21) no longer is Secretary or Treasurer of respondent Institute, he having departed this life on May 22, 1945. This respondent admits the allegation contained in sub-paragraph (1). This respondent, answering sub-paragraph (22), states that William D. Kirkpatrick is not the President of the respondent Institute. This respondent, answering sub-paragraph (23), denies that the respondent Frank A. Bond is an official of the respondent Institute in dealing with freight rate matters. This respondent, answering sub-paragraph (24), denies that the 650
respondent, George J. Campbell, is Vice President of the respondent Institute. This respondent, answering the unnumbered two paragraphs immediately following sub-paragraph (27), states that the respondent Hodell Chain Company is not a member of said Institute; and this respondent denies that he, either individually or jointly, participated in any action of an unlawful nature, whether as charged in said amended complaint or otherwise. As to all other allegations contained in paragraph Three, this respondent has no knowledge and therefore neither admits nor denies the same but demands strict proof.

4. This respondent is without knowledge as to the allegations contained in paragraph Four sufficient to form a be- 651
lief and therefore neither admits nor denies such allegations but demands strict proof thereof. Particularly answering the allegations contained in the last sub-paragraph of paragraph Four, this respondent alleges upon information and belief that said respondent members and other members of the industry are now in active and substantial competition with each other and that said respondent members and other members of the industry have always been in active and substantial competition with each other.

652 *Answer of Respondent Dennis A. Merriman to Amended Complaint.*

5. This respondent denies every allegation contained in paragraph Five and in particular denies that he had any dealings or connection of any kind or nature whatsoever with the respondents Shirley, Olcott and Nichols or either of them.

6. This respondent alleges that he is without knowledge as to the allegations contained in paragraph Six and therefore neither admits nor denies the same but demands strict proof thereof.

653 7. This respondent, answering paragraph Seven, states that he is without knowledge as to the allegations therein contained and therefore neither admits nor denies the same but demands strict proof thereof.

8. This respondent, answering paragraph Eight, states that he is without knowledge as to the allegations therein contained and therefore neither admits nor denies the same but demands strict proof thereof.

9. This respondent, answering paragraph Nine, states that he is without knowledge as to the allegations therein contained and therefore neither admits nor denies the same but demands strict proof thereof.

654 10. This respondent, answering paragraph Ten, states that he is without knowledge as to the allegations therein contained and therefore neither admits nor denies the same but demands strict proof thereof.

11. This respondent, answering paragraph Eleven, states that he is without knowledge as to the allegations therein contained and therefore neither admits nor denies the same but demands strict proof thereof.

12. This respondent, answering paragraph Twelve, states that he is without knowledge as to the allegations therein contained and therefore neither admits nor denies the same but demands strict proof thereof.

13. This respondent, answering paragraph Thirteen, states that he is without knowledge as to the allegations therein contained and therefore neither admits nor denies the same but demands strict proof thereof.

ANSWER TO COUNT II

1. This respondent denies each allegation contained in 656
paragraph One and particularly denies that this respondent, jointly or severally, violated any provision contained in Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

2. This respondent, answering paragraph Two, denies the allegations therein contained.

3 and 4. This respondent, answering paragraphs Three and Four, does hereby incorporate in full his answer as set forth in paragraphs 3 and 4 of his answer to Count I of the amended complaint.

5. This respondent, answering paragraph Five, states that he is without knowledge as to the allegations therein contained and therefore neither admits nor denies the same 657
but demands strict proof thereof.

6. This respondent, answering paragraph Six, states that he is without knowledge as to the allegations therein contained and therefore neither admits nor denies the same but demands strict proof thereof.

7. This respondent, answering paragraph Seven, states that he is without knowledge as to the allegations therein

658 *Answer of Respondent Dennis A. Merriman to Amended Complaint.*

contained and therefore neither admits nor denies the same but demands strict proof thereof.

8. This respondent, answering paragraph Eight, states that he is without knowledge as to the allegations therein contained and therefore neither admits nor denies the same but demands strict proof thereof.

9. This respondent, answering paragraph Nine, states that he is without knowledge as to the allegations therein contained and therefore neither admits nor denies the same but demands strict proof thereof.

659 10. This respondent, answering paragraph Ten, states that he is without knowledge as to the allegations therein contained and therefore neither admits nor denies the same but demands strict proof thereof.

11. This respondent, answering paragraph Eleven, states that he is without knowledge as to the allegations therein contained and therefore neither admits nor denies the same but demands strict proof thereof.

12. This respondent, answering paragraph Twelve, denies the allegations therein contained.

Wherefore, this respondent, having fully answered the amended complaint, prays that it may be dismissed as to him.

660

Dated: November 24, 1945.

Dennis A. Merriman,
By Levy, Goldberg & Lawrence,
His Attorneys,
209 South LaSalle Street,
Chicago, Illinois,
FRanklin 3266.

Filed November 26, 1945.

661

Answer of George J. Campbell, Jr., Individually and as President of International Chain & Manufacturing Company.

Now comes Respondent, George J. Campbell, Jr., individually and as President of International Chain & Manufacturing Company, by Frederick B. Gerber, his attorney, and makes answer to the Amended Complaint filed in the above entitled matter and for answer thereto says:

Answering generally the Amended Complaint George J. Campbell, Jr., individually and as President as aforesaid (hereinafter sometimes called Respondent Campbell, Jr.) denies that he has violated, or is violating or has been, or is a party to any violation of, any of the provisions of the 662
Federal Trade Commission Act, the Clayton Act as amended or the Robinson-Patman Act, as alleged in the amended complaint.

Answering specifically the amended complaint Respondent Campbell, Jr. says:

ANSWER TO COUNT I.

I.

Referring to Paragraph One of Count I of the Amended Complaint, Respondent Campbell, Jr., says:

He denies each and every one of the allegations contained 663
therein.

II.

Referring to Paragraph Two of Count I of the Amended Complaint, Respondent Campbell, Jr., says:

He denies each and every one of the allegations contained therein.

664 *Answer of George J. Campbell, Jr., Individually and as President of International Chain & Manufacturing Company.*

III.

Referring to Paragraph Three of Count I of the Amended Complaint, Respondent Campbell, Jr., says:

The allegations in sub-paragraphs (1), (11) and (20) are admitted.

The allegations in sub-paragraph (21) were true formerly but Walter S. McCann is now dead and is no longer Secretary and Treasurer of Respondent Institute.

665 The allegations in sub-paragraph (22) are admitted, except as follows: Wm. D. Kirkpatrick is no longer President of Respondent Institute.

The allegations in sub-paragraph (23) are denied except that Respondent, Frank A. Bond, an individual, is Executive Vice President and Secretary of Respondent McKay.

The allegations in sub-paragraph (24) are admitted except the allegation that Respondent, George J. Campbell, Jr., is Vice President of Respondent Institute. He formerly was but no longer is such Vice President.

He is without knowledge as to the allegations in sub-paragraphs (2) to (10) inclusive, (12) to (19) inclusive and (25) to (27) inclusive.

666

Referring to the next to the last sub-paragraph of Paragraph Three of the Amended Complaint, Respondent Campbell, Jr., says:

He denies each and every one of the allegations contained therein except that International Chain & Manufacturing Company is a member of said Institute. He denies, however, that it was a member thereof during the period July 17, 1939 to July 15, 1940.

Answer of George J. Campbell, Jr., Individually and as President of International Chain & Manufacturing Company.

667

Referring to the last sub-paragraph of Paragraph Three of the amended Complaint, he says:

He denies each and every one of the allegations contained therein.

IV.

Referring to Paragraph Four of Count I of the Amended Complaint, Respondent Campbell, Jr., says:

The allegations in sub-paragraphs (1) to (7) inclusive are admitted except those contained in the last sentence of sub-paragraph (6) which are denied.

668

Referring to sub-paragraph (8), he says:

It is true that prior to the time referred to in said sub-paragraph as the time of "the adoption of the practices hereinafter described" the Respondent Members of the Institute were in active and substantial competition with each other and with other Members of the Chain Industry in making and seeking to make sales of their products in trade and commerce between and among the several states of the United States and in the District of Columbia. And he alleges that such active and substantial competition does continue and the said Respondent Members are now in active and substantial competition with each other and with other Members of the Industry. Except as thus admitted and alleged the allegations of said sub-paragraph are denied

669

V.

Referring to Paragraph Five of Count I of the Amended Complaint, Respondent Campbell, Jr., says:

670 *Answer of George J. Campbell, Jr., Individually and as President of International Chain & Manufacturing Company.*

He denies each and every one of the allegations contained therein, except, however, he admits the writing of the letter referred to in sub-paragraph (3).

VI.

Referring to Paragraph Six of Count I of the Amended Complaint, Respondent Campbell, Jr., says:

Referring to sub-paragraph 1, he says:

671 As to the allegations in the first two sentences thereof he states that he is without knowledge as to the same. And as to the allegations in the last sentence thereof he denies the same.

He is without knowledge as to the allegations in sub-paragraphs 2 and 3.

He denies the allegations contained in sub-paragraph 4.

Referring to sub-paragraph 5 thereof, he says:

He denies the alleged "joint, concerted and effective action to maintain prices." And as to the other allegations in said sub-paragraph he states that he is without knowledge as to the same.

672 He is without knowledge as to the allegations in sub-paragraphs 6 and 7.

He denies the allegations contained in sub-paragraphs 8 and 9.

Referring to sub-paragraph 10 thereof, he says:

He denies that prices on unpatented tire chains were fixed "by combination of Respondents set forth in Para-

673

graph Five" of the Amended Complaint and denies the alleged combination. As to the other allegations contained therein he states he is without knowledge as to the same.

VII.

Referring to Paragraph Seven of Count I of the Amended Complaint, Respondent Campbell, Jr., says:

He denies the alleged "unlawful combination which is set forth in Paragraphs Five and Six" of the Amended Complaint. As to the other allegations contained therein he states he is without knowledge as to the same.

674

VIII.

Referring to Paragraph Eight of Count I of the Amended Complaint, Respondent Campbell, Jr., says:

He denies each and every one of the allegations contained therein.

IX.

Referring to Paragraph Nine of Count I of the Amended Complaint, Respondent Campbell, Jr., says:

675

He alleges that International Chain & Manufacturing Company usually sells welded chain at a base price F.O.B. Pittsburgh, Pennsylvania, basis; the buyer paying freight from York (where said Company's plant is located) to destination and being allowed credit for the difference between the freight from York to destination and the freight rate from Pittsburgh to destination. And consequently

676 *Answer of George J. Campbell, Jr., Individually and as President of International Chain & Manufacturing Company.*

the actual delivered cost to the buyer equals the base price of the chain plus a sum equal to the freight rate from Pittsburgh to destination.

He alleges that said pricing system used by it in connection with the sale of welded chain was so used by it without any understanding, agreement or combination of any kind whatsoever with any other person or corporation whomsoever. That it has used said system since it has been in the business of selling welded chain—during the period of twenty-one years. He alleges that said system does not
677 constitute an unfair method of competition in commerce or an unfair or deceptive act or practice in commerce. Said system does not prevent or hinder competition. On the contrary it promotes competition in the industry. But for its use monopolies around the respective manufacturing plants of the respondents would result and competition would thereby be destroyed. It does not result in mopolistic control over prices or discriminatory treatment among customers. Its use constitutes a fair method of competition and promotes the public interest. Its use is proper and legal.

Except as hereinabove set forth, he denies each and every allegation contained in said Paragraph Nine.

678

X.

Referring to Paragraph Ten of Count I of the Amended Complaint, Respondent Campbell, Jr., says:

The principal places in the United States where weldless chain is manufactured are York in Pennsylvania, Cleveland in Ohio, Cincinnati in Ohio and Bridgeport in Connecticut.

Answer of George J. Campbell, Jr., Individually and as President of International Chain & Manufacturing Company.

679

International Chain & Manufacturing Company usually sells weldless chain at a base price F. O. B. York Basis, or Cleveland basis, or Cincinnati basis or Bridgeport basis, which ever of said four points is nearest freight-wise to destination; the buyer paying freight from York (where said company's plant is located) to destination and being allowed credit for the difference between the freight from York to destination and the freight rate from the said nearest freight-wise point to destination. And consequently the actual delivered cost to the buyer equals the base price of the chain plus a sum equal to the freight rate from the said 680
nearest freight-wise point to destination.

He alleges that said pricing system used by said company in connection with the sale of weldless chain was so used by it without any understanding, agreement or combination of any kind whatsoever with any other person or corporation whomsoever. That it has used said system since it has been in the business of selling weldless chain—during the period of twenty-one years. He alleges that said system does not constitute an unfair method of competition in commerce or an unfair or deceptive act or practice in commerce. Said system does not prevent or hinder competition. On the contrary it promotes competition in the industry. But for its use monopolies around the respective manufacturing plants of the respondents would result and 681
competition would thereby be destroyed. It does not result in monopolistic control over prices or discriminatory treatment among customers. Its use constitutes a fair method of competition and promotes the public interest. Its use is proper and legal.

Except as hereinabove set forth, he denies each and every allegation contained in said Paragraph Ten.

682 *Answer of George J. Campbell, Jr., Individually and as President of International Chain & Manufacturing Company.*

XI.

Referring to Paragraph Eleven of Count I of the Amended Complaint, Respondent Campbell, Jr., says:

International Chain & Manufacturing Company usually sells tire chains at a base price uniform throughout the United States F. O. B., York, Pennsylvania (where said company's plant is located) the buyer paying the freight from York to destination and being allowed a credit for the freight; except that on orders of less than one hundred
683 and fifty pounds the buyer is not allowed any freight credit.

He alleges that said pricing system used by said company in connection with the sale of tire chains was so used by it without any understanding, agreement or combination of any kind whatsoever with any other person or corporation whomsoever. That it has used said system since it has been in the business of selling tire chains during the period of twenty-one years. He alleges that said system does not constitute an unfair method of competition in commerce or an unfair or deceptive act or practice in commerce. Said system does not prevent or hinder competition. On the contrary it promotes competition in the industry. But for its use monopolies around the respective manufacturing plants of the respondents would result and
684 competition would thereby be destroyed. It does not result in monopolistic control over prices or discriminatory treatment among customers. Its use constitutes a fair method of competition and promotes the public interest. Its use is proper and legal.

Except as hereinabove set forth, he denies each and every allegation contained in said Paragraph Eleven.

Answer of George J. Campbell, Jr., Individually and as President of International Chain & Manufacturing Company. 685

XII.

Referring to Paragraph Twelve of Count I of the Amended Complaint, Respondent Campbell, Jr., says:

He denies each and every one of the allegations comtained therein.

XIII.

Referring to Paragraph Thirteen of Count I of the Amended Complaint, Respondent Campbell, Jr., says: 686

He denies each and every one of the allegations comtained therein.

ANSWER TO COUNT II.

I.

Referring to Paragraph One of Count II of the Amended Complaint, Respondent Campbell Jr., says:

He denies each and every one of the allegations contained therein.

II.

687

Referring to Paragraph Two of Count II of the Amended Complaint, Respondent Campbell, Jr., says:

He denies each and every one of the allegations contained therein.

688 *Answer of George J. Campbell, Jr., Individually and as President of International Chain & Manufacturing Company.*

III AND IV.

Referring to Paragraphs Three and Four of Count II of the Amended Complaint, Respondent Campbell, Jr., incorporates Paragraphs III and IV of his answer to Count I of the Amended Complaint to precisely the same extent and effect as if each and all of them were set forth in full and repeated verbatim in this Answer to Count II of the Amended Complaint, except the definition of the term "commerce." The term "commerce" as hereinafter used
689 means "commerce" as defined and set forth in the Clayton Act.

V.

Referring to Paragraph Five of Count II of the Amended Complaint, Respondent Campbell, Jr., says:

He admits and repeats and incorporates herein the allegations set forth in his answers to Paragraphs Nine, Ten and Eleven of Count I of the Amended Complaint. He denies each and every allegation contained in said Paragraph Five, except to the extent of the allegations hereby admitted, repeated and incorporated herein.

690

VI.

Referring to Paragraph Six of Count II of the Amended Complaint, Respondent Campbell, Jr., says:

He admits and repeats and incorporates herein the allegations set forth in his answer to Paragraphs Nine, Ten and Eleven of Count I of the Amended Complaint. He denies each and every allegation contained in said Para-

691

graph Six, except to the extent of the allegations hereby admitted, repeated and incorporated herein.

VII.

Referring to Paragraph Seven of Count II of the Amended Complaint, Respondent Campbell, Jr., says:

He admits and repeats and incorporates herein the allegations set forth in his answers to Paragraphs Nine, Ten and Eleven of Count I of the Amended Complaint. He denies each and every allegation contained in said Paragraph Seven, except to the extent of the allegations hereby admitted, repeated and incorporated herein.

692

VIII.

Referring to Paragraph Eight of Count II of the Amended Complaint, Respondent Campbell, Jr., says:

He denies each and every one of the allegations contained therein.

IX.

693

Referring to Paragraph Nine of Count II of the Amended Complaint, Respondent Campbell, Jr., says:

He admits and repeats and incorporates the allegations set forth in his answers to Paragraphs Nine, Ten and Eleven of Count I of the Amended Complaint. He denies each and every allegation contained in said Paragraph Nine, except to the extent of the allegations hereby admitted, repeated and incorporated herein.

694 *Answer of George J. Campbell, Jr., Individually and as President of International Chain & Manufacturing Company.*

X.

Referring to Paragraph Ten of Count II of the Amended Complaint, Respondent Campbell, Jr., says:

He denies each and every one of the allegations contained therein.

XI.

Referring to Paragraph Eleven of Count II of the Amended Complaint, Respondent Campbell, Jr., says:

695

He denies each and every one of the allegations contained therein.

XII.

Referring to Paragraph Twelve of Count II of the Amended Complaint, Respondent Campbell, Jr., says:

He denies each and every one of the allegations contained therein.

Wherefore, the Respondent, George J. Campbell, Jr., individually and as President of International Chain & Manufacturing Company, prays the said Amended Complaint be dismissed as to him.

696

George J. Campbell, Jr., Individually and as President of International Chain & Manufacturing Company,
By Frederick B. Gerber,
His Attorney,
Court House Annex,
36 East Market Street,
York, Penna.

Filed November 27, 1945.

697

Letter to the Federal Trade Commission.

"New York 5 April 30, 1948

"Federal Trade Commission
Constitution Avenue
Washington, D. C.

Attention of Mr. Otis B. Johnson, Secretary

IN THE MATTER OF CHAIN INSTITUTE, INC., PYRENE MANUFACTURING COMPANY, ET AL.—
Docket No. 4878.

698

"Gentlemen:

"On behalf of Pyrene Manufacturing Company, one of the respondents in the above-named proceeding, we wish to advise you as follows:

"Today, April 30, 1948, Pyrene Manufacturing Company sold its plant, equipment and all other assets relating to its business of manufacturing and selling tire chains, with certain minor exceptions, to The Newark Chain Company, 15 Exchange Place, Jersey City, New Jersey, and, in addition, Pyrene Manufacturing Company agreed with said purchaser that it would not engage in the business of manufacturing and selling tire chains for a period of five years anywhere in the United States, except some nominal states. Pyrene Manufacturing Company accordingly has ceased to be in the chain business in any manner whatsoever and does not propose to re-enter such business. Pyrene Manufacturing Company also does not intend to take any further action or to go to any further expense in connection with its defense of the complaint in the above-entitled proceeding, as, insofar as it is concerned, the matters complained of are now moot.

699

"Accordingly, you may take this letter as our motion that the proceedings in the above-entitled matter be terminated as to Pyrene Manufacturing Company, that it be excluded as a respondent from the above-entitled proceedings, that the complaint in the above-entitled proceedings be dismissed as to Pyrene Manufacturing Company, and that the Commission enter an order accordingly.

"Respectfully submitted,

/s/ PYRENE MANUFACTURING COMPANY

By CHADBOURNE, HUNT, JAECKEL & BROWN, its attorneys."

701 Filed May 7, 1948.

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

In the Matter of CHAIN INSTITUTE, INC., an incorporated trade association, its directors, officers and members, et al.	Docket No. 4878

702

Proposed Findings as to the Facts.

[By Attorney Supporting the Complaint]

PARAGRAPH ONE: Respondent Chain Institute, Inc., a trade association, is a corporation organized and existing under the laws of the State of Delaware, with its principal

703

office at 208 La Salle Street, Chicago, Illinois. Said respondent was organized in June, 1933 (R. p. 599).

Respondent American Chain & Cable Company, Inc., is a corporation organized and existing under the laws of the State of New York, with its principal office at Bridgeport, Connecticut, and its general office at 230 Park Avenue, New York, N. Y. It joined said Institute in June 1933, and is still a member thereof. It has a plant at York, Pennsylvania, and one at Braddock, Pennsylvania, at which plant(s) it manufactures welded, weldless and tire chain (R. 599, page 2 Answer of said respondent to amended complaint herein).

704

Respondent Bridgeport Chain & Manufacturing Company is a Connecticut corporation with its principal office at 964 Crescent Avenue, Bridgeport, and plant at the same location (R. 599-600), where it manufactures and sells welded, weldless and tire chain (Amended Answer to Amended Complaint, pp. 2-3).

Respondent The McKay Company is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal office located at York, Pennsylvania, and a plant at McKees Rock, Pennsylvania, where it manufactures and sells welded, weldless and tire chain. Said respondent joined the said Institute in June, 1933, and has since been a member thereof (R. 600; Answer to amended complaint, pp. 4-7).

705

Respondent Pyrene Manufacturing Company is a corporation organized and existing under the laws of the State of Delaware, with its principal office located at Newark, New Jersey, and its plant located in the same city, where it manufactures and sells tire chain. Said respondent joined respondent Chain Institute, Inc., in June, 1933, and has since said time been a member thereof (R. 600).

706 *Proposed Findings as to the Facts.*

Respondent Hodell Chain Company is a corporation organized and existing under the laws of the State of Ohio, and has its plant at Cleveland, Ohio, where it manufactures and sells welded, weldless and tire chain. It joined the respondent Chain Institute, Inc., in 1935, but resigned in 1939 (R. 709-710).

Respondent St. Pierre Chain Corporation is a corporation organized and existing under the laws of the State of Massachusetts, with its principal office located in Worcester, Massachusetts, and plant at the same location, where during the period covered by the amended complaint, it manufactured and sold tire chain. It joined said Chain
707 Institute, Inc. in June, 1933, and still continues as such member (R. 691).

Respondent Cleveland Chain & Manufacturing Company is a corporation organized and existing under the laws of the State of Ohio with principal office located in Cleveland, Ohio, and plant at the same location, where during the period covered by the amended complaint, it manufactured and sold welded, weldless and tire chain. It joined the Chain Institute, Inc. in June, 1933, and is still a member thereof (R. 601-2).

Respondent Columbus McKinnon Chain Corporation is a corporation organized and existing under the laws of the State of New York, with principal office located at Tonawanda, New York, and plant at the same location, where,
708 during the period covered by the amended complaint, it manufactured and sold welded, tire chains (Amended Answer of said respondent, p. 3). It joined the respondent Chain Institute in June, 1933, and has been a member thereof ever since that time (R. 602).

Respondent International Chain & Manufacturing Company is a corporation organized and existing under the laws of the State of Pennsylvania with its principal office

located at York, in said State, and its plant at the same location, where, during the period covered by the amended complaint, it sold welded, weldless and tire chain (Answer to Amended Complaint). It joined respondent Chain Institute in June, 1933, and resigned therefrom on June 17, 1939, rejoined on June 15, 1940, and has since been a member of said Institute (R. 602-3).

Respondent Nixdorff-Krein Manufacturing Company is a corporation organized and existing under the laws of the State of Delaware, with its principal office located at St. Louis, Missouri, and plant at the same location where, during the period covered by the amended complaint, it manufactured and sold welded and tire chain and sold weldless 710
chain. It joined said Chain Institute, Inc., in June, 1933, and has since been a member thereof (R. 603).

Respondent Peerless Chain Company is a corporation organized and existing under the laws of the State of Minnesota, and plant at the same location, where, during the period covered by the amended complaint, it manufactured and sold welded, weldless and tire chain. It joined the respondent Chain Institute, Inc., in July, 1933, and has since been a member thereof (R. 603).

Respondent Round California Chain Company, is a corporation organized and existing under the laws of the State of California, with its principal office located in South San Francisco, California, and plant at the same location 711
where, during the period covered by the amended complaint, it manufactured and sold welded chain and sold weldless and tire chain (R. 603-4).

Respondent J. M. Russell Manufacturing Company is a Connecticut corporation with its principal office located at Naugatuck, Connecticut, and plant at the same location, where during the period covered by the amended complaint, it manufactured and sold the type of weldless chain known

as sash and kindred chain. It joined the Sash and Kindred Chain Manufacturers Division of the Chain Institute in July, 1933, and has continued as a member thereof (R. 604).

Respondent Seattle Chain & Manufacturing Company is a State of Washington corporation with its principal offices at Seattle and plant at the same location, where, during the period covered by the amended complaint, it manufactured and sold welded chain and sold weldless and tire chain (R. 604).

Respondent Turner & Seymour Manufacturing Company is a Connecticut corporation with its principal office at
713 Torrington, Connecticut, and plant at the same location, where it manufactures and sells sash and kindred chain. It joined the Sash and Kindred Chain Group of the Weldless Chain Manufacturers Division of the Chain Institute in July, 1933, and has since been a member thereof (R. 604-5).

Respondent Western Chain Products Company, is an Illinois corporation with its principal office located at Chicago, Illinois, and plant at the same location where, during the period covered by the amended complaint, it manufactured and sold welded, weldless and tire chain. It joined the Chain Institute in July, 1933, and has since been a member thereof (R. 605).

Respondent Woodhouse Chain Works, is a New Jersey
714 corporation with principal office in Trenton, New Jersey, and plant at the same location where it manufactures and sells welded chain and sells weldless and tire chain. It joined the Chain Institute in June, 1933, and has since been a member thereof (R. 714).

Respondent Dennis A. Merriman, an individual is Managing Director of respondent Chain Institute, with office located at Chicago, Illinois (R. 606).

715

Respondent Walter S. McCann, a former Secretary of said Institute, died on May 19, 1945 (715).

Respondent William D. Kirkpatrick, an individual, is Vice-President of respondent American, and from November, 1942, to November, 1944, was president of respondent Institute. His office is located at the office of respondent, American, at York, Pennsylvania. Since June, 1933, he has represented respondent American in its membership in respondent Institute, and as such representative of respondent American, attended meetings of representatives of other members, and in that capacity communicated with other representatives of members of respondent Institute concerning action of the Institute, its officials and members (R. 715).

716

Respondent Frank A. Bond, an individual, is Executive Vice-President of respondent McKay, with office located in Pittsburgh, Pennsylvania. Since 1933 he has represented respondent McKay in its membership in respondent Institute, and as such representative of McKay has attended meetings of representatives of other members and in that capacity served on committees of respondent Institute, wrote and otherwise communicated with other representatives of members of respondent Institute concerning action of the Institute, its officers and members. He served from June, 1933 to date as Chairman of the Traffic Committee of the Chain Institute in dealing with freight rate matters (R. 607).

717

Respondent George J. Campbell, Jr., an individual, has been president of respondent International Chain & Manufacturing Company since September, 1943, with offices located at the principal place of business of respondent International in York, Pennsylvania. Since 1941 he has represented said respondent in its membership in respondent. His father, George J. Campbell, Sr., was president of respondent International from 1922 to September 9, 1941,

when he died. From June 19, 1933 to June 17, 1939, and from June 15, 1940 to September 9, 1941, he represented respondent International in its membership in respondent Institute and as such representative attended meetings of representatives of other members, and in that capacity, served on committees of respondent Chain Institute, wrote and otherwise communicated with other representatives of members of respondent Institute concerning action of the Institute, its officials and members (R. 607-608).

Respondent Alfred Peter Shirley is an engineer and manufacturer's sales representative, and is a partner in the firm of Shirley, Olcott & Nichols, with offices in the
719 Mills Building, Washington, D. C. (R. 608).

Respondent Floyd B. Olcott is an engineer and manufacturer's sales representative, and is a partner of the firm of Shirley, Olcott & Nichols, which maintains its offices in the Mills Building, Washington, D. C. (R. 608).

Respondent Forrest C. Nichols who resides in Washington, D. C., and who is a manufacturer's sales agent, is a partner of the firm of Shirley, Olcott & Nichols aforesaid (R. 609).

Respondents Cleveland, Seattle, Round and Bridgeport, are affiliated through common ownership of the controlling capital stock of each of said respective corporations. L. C. Cull is Chairman of the Board of Directors of each of said
720 four corporations. Through his representation of respondent Cleveland in the membership in said Institute, he also represented respondents Seattle, Round and Bridgeport and their interests, at meetings of members of the respondent Institute and in other activities of the Institute (R. 609).

PARAGRAPH TWO: Respondent Manufacturers produce various types of chain, the principal types being welded, weldless and tire chain (R. 609).

Welded chain is so designated because each link is closed and sealed through welding. It includes Anchor Chain, Tie Chains for securing cows at stanchions, Tie-Out chains for securing animals for grazing and Trace Chains for harnessing teams and other uses. With the development of the art of electric welding, the welded chain industry has used it for mass production of its chain. Welded chain is referred to as commercial chain and pound chain and is sold by the pound (R. 610).

Weldless chain is most light in weight and is used generally where the stronger chain is not required and is classified into two principal types. (1) Ordinary weldless chain which is made by bending wire into the form of links and 722
knotting rather than welding; it is used as cow ties, porch swing chain, well chain, dog leads, animal trap chains and for many other purposes. (2) Sash and Kindred Chains which are made by stamping or cutting the links from flat metal strip stock, are used as window sash chain, transom chain, furnace chain, ships' telegraph chain, and for many other purposes (R. 610).

Tire chains are made by the welding process but are linked as to form two line chains connected by cross chains of equal distances so that they may be attached around the wheels of motorized equipment, including automobiles, trucks and farm tractors (R. p. 610-611).

Respondent Manufacturers, in the course and conduct 723
of their business manufacture, sell and distribute practically all the Welded Chain, Weldless Chain and Tire Chain produced in the United States, and sell said products at various points throughout the United States to wholesalers, dealers and consumers including the United States Government, and when sales are made, Respondent Manufacturers have regularly shipped and do ship said products to the purchasers at points in the several states of the

United States and the District of Columbia other than in the States of origin of the shipments. They are engaged in "commerce" as defined in the Federal Trade Commission Act and the Clayton Act (R. 611).

PARAGRAPH THREE: Respondents American, McKay, Pyrene, St. Pierre, Taylor, Cleveland, Columbus, International, Nixdorff and Woodhouse organized Respondent Institute in June, 1933 (R. 611).

Respondent members operate respondent Institute to promote and serve their mutual interests. They employed respondent Merriman on August 1, 1938, with the title of
725 Managing Director of respondent Institute and he has served as such since that time. In 1933, respondent Institute employed one Charles Donley, a freight rate expert to compile freight rates on welded chain from Pittsburgh, Pennsylvania, to destinations throughout the United States and to revise the same from time to time. The compilation is not intended to serve any need for freight rates for shipping purposes but is designed for their use in pricing and is so used (R. 612).

Respondent American has for more than 25 years been the most important factor in the chain industry in this country and is the largest manufacturer of the types of chain described herein (R. 613). Toward the end of the 1920's it acquired patented inventions covering improve-
726 ments in tire chains known as bar reinforced anti-skid devices. Such anti-skid devices are made a part of the treat members in the cross chains of tire chains (R. 614). American entered into so-called license agreements with McKay, Pyrene, Hodell, St. Pierre and S. G. Taylor whereby American supplied such respondents or licensees with their bar reinforced tread chain members though the same were in rough, unfinished form, and before such links could be adapted to any useful purpose, extensive work and process-

727

ing was required on the part of the licensees. The said licensees made all the parts of their tire chains excepting the rough, untreated reinforced tread chain members received from American, and after preparing the same for use in their chain, completed their chain. The license agreements with American provided for the selling prices at which the licensees were to sell their chain, although such chain, when completed, was not a patented chain. Such price control by American was yielded in 1942, at a time when the Federal Trade Commission was investigating the chain manufacturers (R. 615-616).

728

Each of the respondents American, McKay, Pyrene and Hodell entered into an arrangement in 1937 with respondents Shirley, Olcott and Nichols who were to endeavor to sell Tire Chains embodying the patented anti-skid bar reinforced feature to various agencies of the Federal Government through the Procurement Division of the Treasury Department, as well as to others (R. 617). Respondents St. Pierre and Taylor became parties to said arangement in respect to sales of said chains to the Federal Government commencing January 1, 1940. Respondent McKay withdrew from said arrangement on June 30, 1940. Said licensees extended their arrangement with respondent Shirley to cover all types of tire chains manufactured by them. Such arrangement with Shirley was terminated on October 15, 1942 (R. 619).

729

PARAGRAPH FOUR: The manufacturing respondents use a formula for pricing and selling their welded chain and products; another formula for pricing and selling their weldless chain and products; and still another formula for pricing and selling their tire chain.

The formulae are exactly the same in principle in that each is designed to permit each respondent to quote and sell its product at the identical arbitrary delivered price at

which all other respondents quote and sell their products at any given time and place.

In pricing and selling their welded chain and welded chain products, respondents have fixed uniform prices therefor, and each respondent adds to such prices an arbitrary amount equivalent to what the freight from Pittsburgh to destination would be on such products if the products had been actually produced at or shipped from Pittsburgh (R. 872-3).

In pricing and selling their weldless chain or weldless chain products, respondents fix a uniform price therefor
731 and each respondent adds to that price an arbitrary amount equivalent to what the freight charge would be from the nearest freightwise of the following mills, York, Pennsylvania, Cleveland, Ohio, Cincinnati, Ohio, or Bridgeport, Connecticut, to destination, even though the product may not have been produced at or shipped from such mill (R. 873-4).

In pricing and selling their tire chains, respondents merely fix the same price to everyone everywhere and they pay whatever freight charge is incurred in shipping such tire chains to destination (R. 874-5).

The inevitable result of following these formulae is that each respondent sells its products at the arbitrary, identical delivered figure to the purchasers which all other respond-
732 ents do at any given time and place. Competition in price is therefore completely eliminated by the use of the formulae.

Counsel supporting the complaint contend that in an average of 95% of respondents' total sales of each of the three types of chain and chain products (i.e., welded, weldless and tire) during the period covered by the complaint, respondents followed the pricing and selling practices hereinbefore set forth, whereas respondents, while conced-

ing that said practices were followed, contend that they were followed in an average of only 80% of such total sales. It is conceded by counsel supporting the complaint that during the depressed periods of 1932, the early part of 1933, and 1936 and 1938, the said estimated percentage of respondents' total sales in which respondents followed the pricing and selling practices hereinbefore set forth was considerably lower than said 95%, and respondents contend that during said depressed business periods said estimated average percentage was considerably lower than said 80% (R. 876-876).

While Columbus-McKinnon Chain Corporation did not sign the stipulation appearing at pages 596-633 of the Transcript of Record, it did stipulate that duly appointed representatives of those who did sign the stipulation, if called as witnesses in this case, would testify to the same effect of the language that appears in the said stipulation, and further that the record may be taken with the same force and effect as if such witnesses had appeared and so testified (R. 742-743). 734

Columbus-McKinnon was not a party to the stipulation signed by most of the respondents appearing at pages 871-8 of the transcript of record, but did stipulate (R. 926-8) that their invoices (Com. Ex. 1568, pages 210 to 323, and Com. Ex. 1571, pages 122 to 126, and Com. Ex. 1574, pages 528 to 538, demonstrate the manner, form and substance of said respondent's methods of making sales of their welded, weldless and tire chains, substantially all of said sales having been made at the prices contained in said respondent's published price lists and published discounts therefrom (R. 927). The record shows that the price lists and discount sheets of Columbus-McKinnon are the same as those of American. 735

Respondent Hodell Chain Company did not sign the stipulation appearing at page 596-633 of the record, but signed.

a substantially similar stipulation appearing at pages 704-742 of the Record.

Respondents Turner & Seymour Manufacturing Company and J. M. Russell Manufacturing Company did not sign the stipulation appearing at pages 871 to 878 of the Transcript of Record, but did sign the stipulation appearing as respondents' exhibit No. 52 and respondents' exhibit No. 51 respectively.

PARAGRAPH FIVE: Letters showing the activity of the Institute in maintaining agreed prices are in the record.

737 W. D. Kirkpatrick, Vice-President of respondent American Chain & Cable Company, wrote W. C. Perkins, Manager of the Pittsburgh Sales Office of American, on November 14, 1938:

> "I am not sure I told you that on Thursday and Friday of this week we will have a Chain Institute meeting. Of course, *you know how we have been fighting for price stabilization*, and perhaps you will run into some irregularities where you will see positive evidence of price weakening. If you have any definite information, will you kindly get it to me prior to this meeting * * * *" (Com. Ex. 91).

738 The same character of letter is one addressed by the International Chain & Manufacturing Company to its agent at Memphis, Tennessee, under date of May 10th, 1939, in which Mr. Campbell, Sr., President of International, wrote:

> "The next meeting of the Chain Institute will be held next Tuesday and Wednesday, and I would suggest that you lay a little bit low on any prices given out until that time; * * * *" (Com. Ex. 385).

W. C. Perkins, Manager of Pittsburgh Sales Office of respondent American wrote to A. P. Van Shaick, now de-

ceased, formerly General Sales Manager of American, under date of April 18, 1938:

> "Now as to the matter of price on traces, the old list price of $57.50 less 20-10% seemed to be prevalent, so that no competitor evidently attached much importance to the statement you made at the Institute meeting here in Pittsburgh as to what we would do if the *64¢ list price* and the *agreed* discount were not *maintained* * * *" (Com. Ex. 84-B).

The above letters clearly show that the subject of prices was an important factor in the activities of the Chain Institute and that agreements concerning prices were constantly made at such meetings. The members fussed and fumed among themselves to see that the agreed prices and discounts under the pricing systems of the three types of chain were maintained (R. line 23, p. 1094 to line 3, p. 1099; p. 1199). Counsel for the respondents asked one of their witnesses: "Were there any discussions that took place at the time of the meetings, but not at the official meetings?" Mr. Bond, the witness, replied by detailing the subject of discussion of prices (R. 1095-1099). The Institute could not relieve itself from liability by simply adjourning when the members were ready to discuss prices. The Institute called the official meeting together and gave the members the opportunity to discuss prices when they were ready to do so. 740

Mr. Bond was perfectly frank in describing the price discussions which took place among the members outside of the official meetings. He stated that while the members were at lunch or adjourning for a drink or something, then they started talking. They accused one another of giving some extras or of price cutting, and threatened reprisals. He stated that when two businessmen get together they are bound definitely to gravitate that talk to the price structure 741

in the industry. When a competitor in the case of welded or weldless chain was selling f.o.b. and allowing the freight, that would be price cutting. They would discuss that because the competitor was supposed to sell at a certain price (R. 1098-9).

It is patent that if prices had not been agreed upon there would not have been the bitter conversations to which Mr. Bond testified. As Mr. Bond stated, these conversations were provoked by some member selling at prices at which he was not *supposed* to sell. The members fought to maintain fixed prices.

743 Cooperation between members was somewhat lessened during depressed periods as witness the quotation from the letter dated March 30, 1938, of Mr. Perkins, Manager of Pittsburgh sales for American, addressed to Messrs. Kirkpatrick, Seitz and Trevethan also of American.

> "It was supposed that all trace chain manufacturers would *adhere to the $64.00 list price*, but the quotation referred to above indicates some one or more of them are not doing it, and we are going to meet the condition and take care of our good customers. • • • Confidentially, and not to be discussed by you with any one, there is a meeting of the Chain Institute tomorrow and Friday, and I do not know what may grow out of the meeting. The instructions given you above and in my tele-
> 744 gram are to be the basis of our action until you have other word from me" (Com. Ex. 86 A and B).

W. C. Perkins of American writes W. D. Kirkpatrick of American on April 5, 1939:

> "I have not heard from you further since your recent suggestion that the Industry felt prices on trace chains should be *determined* in advance of the meeting of the convention at New Orleans on 17th inst. • • •. You re-

call the fiasco last spring when we very ill-advisedly *agreed to the establishment of a list of 64¢ on 7-8-2 Ring, with a discount of 20%*, and attached to this was the provisions that an additional 10% was to be accorded to certain leading customers. I did not agree to this program but I was overruled and we put ourselves at the mercy of some of our competitors, who immediately proceeded to disregard what they *stated they intended to do*, and I think it would be a very fatal mistake for us to stick our neck out again" (Com. Ex. 87).

In the foregoing letters, the inference is quite inescapable that the respondent Chain Institute meetings were strong 746
factors in the price-fixing activities of the members.

To illustrate the further connection of the Chain Institute with the price fixing and price maintenance activities of the members, we quote from some letters of International Chain & Manufacturing Company.

George J. Campbell, Sr., President, International Chain & Manufacturing Company, now deceased, wrote to International's agent, H. G. Reinicker, on January 29, 1937:

"Just returned from Chicago, after the meeting in Cleveland and I see that you have already advised the Office here that you received my notice of the price advance to go into effect immediately of 45¢ per cwt. • • • We are getting our new price list printed and will send 747
you a quantity some time this coming week. • • • I cannot give you the exact raise in the prices of weldless chain as yet, because I left the meeting a little early and just as soon as we get word from the American Chain Company of these price lists, we will send you a copy and tell you all about it. • • • " (Comm. Ex. 360).

748 *Proposed Findings as to the Facts.*

Melvin H. Campbell, Secretary of respondent International Chain & Manufacturing Company, wrote to H. G. Reinicker on March 11, 1937, saying that:

> "This morning we received a 'phone call from Mr. Van Shaick of the American Chain Company in Bridgeport, and he said that they were today notifying all their trade of the withdrawal of all prices on trace chains and they wondered if we would do likewise. They stated that they understood McKay and Cleveland were doing the same • • •.
>
> "We, therefore, thought their suggestion was good and we are issuing a notice to the trade today that all
749 prices on trace chains are withdrawn as of this date" (Comm. Ex. 361).

On July 15, 1937, George J. Campbell wrote Reinicker:

> "Just hung up the 'phone from talking with Van Schaick of Bridgeport. Van is very angry with me although he talked nicely, and stated he didn't know what in the devil I was doing about trace chains, especially in stealing his customer. He stated he had the Monroe Hardware Company order for the last three weeks at regular prices, and now he stated we have taken the business away from him, and they feel a little peeved about it, *and suggested that probably*
750 *the result would be, if it kept on, that all prices would reach the level that we made.*
>
> "We would suggest that your men keep away as much as possible from any of the American Chain Company's customers, because they are the ones that, of course, 'pull the whole temple down', while the others, like McKay, will just have to 'bite their tongue and stand for it" (Comm. Ex. 364).

On August 28, 1937, Mr. Campbell, Sr. wrote Mr. Reinicker:

"I am positive that the price on trace chains will be advanced at the next meeting, which will be about the 21st of September; so when the boys go out to see the customers that are still doubtful about the price situation, they can inform them that prices are going to advance—in fact, they have to advance. The manufacturers all brought their cost papers on 3/8" chain and 7-7-2 Traces, and there wasn't one of them that could possibly make a nickel out of it on those costs that they gave to the Institute, which are practically correct as they tallied a great deal with our own" 752 (Comm. Ex. 372).

George J. Campbell wrote Mr. Reinicker on September 14, 1937:

"Have your letter of the 13th regarding the Orgill Bros. situation and would state that really if anything, it is up to the writer, *whether the Trace Chains will be advanced or not at our next meeting*, because I think all the other members are anxious to advance prices and especially inasmuch as the American Chain Co. representatives suggested at our meeting a couple of weeks ago * * *. I am very much inclined * * * to go ahead and assist in getting the prices higher. * * * No matter what is done at our next meeting, which is 753 being held in Chicago on the 21st., I will wire you immediately, so you can tell the boys, just what is what. *If there is any advance it will only be on trace chains*" (Comm. Ex. 376).

On September 27, 1937, George J. Campbell wrote Mr. Reinicker:

"In reference to Pound Chain would state the manufacturers seem so anxious to hold to the price that

they thought to stiffen the market it would be a good idea to put out a quarterly price sheet so you will probably hear from some of your friends that they have received a new price sheet on Pound Chain from their chain factories. *If you do, you will know it is the regular sheet printed over again the same as we have been working on entirely. There is no change*" (Comm. Ex. 317).

The Secretary of International Chain Manufacturing Company wrote Mr. Reinicker on October 16, 1937:

"We attach hereto a copy of our new price list and
755 discount sheet #26 which you will notice inaugurates a new policy of the chain manufacturers to issue these on a quarterly basis.

"*There are no changes in the prices, simply being a reaffirmation of price list #26, in hopes it might help to straighten the price situation.*

"We are sending these to all your customers which we have on the card index file and we are also sending you a quantity under separate cover, as well as a few to each of your salesmen" (Comm. Ex. 319).

On November 22, 1937, Mr. Campbell Sr., wrote Mr. Reinicker:

756 "Just returned from the meeting in New York and nothing was mentioned about trace chains as tire chains took up most of the time.

"As far as tire chains go, just keep on going the way you have. • • •

"*The understanding left was that we should drift along for another month and not to make any public price of 33⅓-10% but everybody I think left the room*

with a note in the back of their head that hereafter the price of pound chain is 33⅓-10%. You can notify your men to accept any Pound Chain business offered to them on the basis of 33⅓-10%, f.o.b. Pittsburgh, from the present list" (Comm. Ex. 323).

On January 4, 1938, Mr. Campbell wrote Mr. Reinicker:

"There is * * * the meeting of the regular members of the Chain Institute, for the two days following in Chicago. Maybe something can be accomplished to uphold a fair price on chains which has certainly become very demoralized during the past three months and recognized so by all the manufacturers" (Comm. 758 Ex. 354).

On March 11, 1938, Mr. Campbell, Sr., wrote Mr. Reinicker:

"We had a very interesting and serious meeting again in Pittsburgh. A new sheet will be out on Trace Chains any day, and I believe it will be on a basis of $64.00 for 7-8-2 traces, less 20%, with confidential 10%, f.o.b. Pittsburgh, Pa. "Pound Chain—same as heretofore—33⅓%, with confidential 10%.

"Regarding the three (3) accounts for carload of trace chains that Jack talked about, if they want to pay for them immediately with the order, or as soon as we can send them a bill, *they will have to be dated back now previous to the day before yesterday,* and our billing will have to be accordingly. Otherwise, we are going to stick fast to these new prices, and I can pretty nearly guarantee you the rest will do likewise" (Comm. 759 Ex. 353).

On April 4, 1938, Mr. Campbell, Sr., wrote John K. Wilson that:

> "*Nothing was changed at the meeting. The price on trace chains you have, and the price on pound chain is supposed to be 33⅓% and the 10% confidential.*
> "*The situation regarding tire chains is still in abeyance, but I think will be settled in another couple weeks*" (Comm. Ex. 352).

On June 27, 1938, Melvin H. Campbell wrote Reinicker:

> "I was just talking to Mr. Treyathan of the American Chain & Cable Company in respect to prices on Weld-
> 761 less Chain Items, and *he confirmed that the price on Porch Swing Chains seemed to be 70-10%, which is what we have decided.*
>
> "On pump chain, he states that sometimes they have been able to get full printed prices, namely: $6.85 per 100 lbs., but he has heard of an extra 10% beyond that, which would bring it a little below our $6.50 per 100 lbs. * * *" (Comm. Ex. 348).

On July 25, 1938, Mr. Campbell, Jr. wrote John K. Wilson:

> "In respect to authorizing you to inform your salesmen to meet the prices where competition requires it; Mr. Campbell, Sr. hesitates to do this until he returns
> 762 from the Chain Institute meeting the end of this week."

On August 22, 1938, Mr. Campbell, Sr. wrote Mr. Reinicker:

> "Have your very interesting letter of the 19th, regarding the 33⅓-20% with full freight on pound chain. "We did hear of one instance where McKay made a price of 33⅓-20% with full freight allowed on one solid car of pound chain to go to Texas. "This was brought to McKay thru Frank Bond at one of our meet-

ings—the • • • last meeting, and he denied it very vehemently, but I think it was true because Cleveland also accused him of it. "I do not believe that this is true of this price anywhere else. I think you have about as good a price as there is on the market today, and I am very sure, too, that the prices will advance by our next meeting. *However, I will take this up with Dennis Mc iman when he comes to York on Wednesday, together with the price situation on the Tie Out chains about which you wrote us a couple days ago.* • • • " (Comm. Ex. 344).

On August 25, 1938, Mr. Campbell, Sr. wrote Mr. Reinicker: 764

"We have received word from our representative in New York City, and our representative in New England, and just this morning from a party way out in the Northwest that someone is quoting 60-10-10-10% on tire chains, against 50-5-5-5%.

"We just happen to know who it is—the Hodell Company, and undoubtedly they are unloading a lot of their material to get money, as we have had a check on their credit from Dun & Bradstreet, and I believe they are in pretty bad shape for ready cash, especially • • •. *This matter of the Hodell Company is under consideration at the present time, and I expect a conference in York tomorrow with Mr. Kirkpatrick and Mr. Dennis Merriman, and we will go over the situation and decide probably, to call a meeting of the industry at once, to see what we can do to overcome this new problem that has arisen.* • • • Will keep you informed of anything new. • • • " (Comm. Ex. 343). 765

On October 1, 1938, Melvin H. Campbell, Secretary of International Chain & Manufacturing Company, wrote its agent, John K. Wilson Company:

"*We have just received new price lists and discount sheets issued by the American Chain Company. * * * We of course will follow suit as soon as we can have our price lists and discounts printed, and in the meantime I am sending you attached hereto a discount sheet with the new discounts indicated, so that you may advise your salesmen*" (Comm. Ex. 342).

On October 22, 1938, George J. Campbell wrote his sales agent John K. Wilson Company:

"Have just returned from the Chicago meeting and sorry to state that thru the stubbornness of American
767 Chain Company, the prices on chain still stands 'status quo', the same as what you have sent out in your letters. * * *"

On March 16, 1939, Mr. George J. Campbell wrote John L. Wilson, Jr.:

"Have your letter of the 15th regarding the discounts for Tongue Chains and Heel Chains to the Stratton-Warren Company by Mr. Hardison.

"You can tell Mr. Hardison to go ahead and accept the business at the prices mentioned in your letter.

"Tell him now, though, to be very cautious about any price below the new prices, unless they are people he
768 can absolutely trust and can get some business from. Of course, *we can only handle this at the old price for a few days more—Otherwise it will break up the whole situation again if the other manufacturers find that we have not raised our prices.*

"We still have the excuse, inasmuch as we have not issued our new prices, but these will go forward today or tomorrow; so after that we have to be unusually cautious, although we would like to have Stratton Warren's business this season, if we can" (Comm. Ex. 338).

On April 7, 1939, George J. Campbell wrote agent John K. Wilson, Jr.:

"We spent so much time at our meeting regarding tire chains, that trace chains and pound chain did not come up until almost time for adjournment; so that they decided that they would postpone any proposition on trace chains until those that were going to New Orleans *would have a meeting down there and would decide on the price for the coming season, and they would wire me just as soon as a decision was made.* * * *" (Comm. Ex. 382).

Mr. Campbell, Sr. wrote his agent, J. Skelton Hardison, on April 12, 1939: 770

"I waited all day Tuesday for some reply, or some word from the chain manufacturers, but Mr. Merriman called me on the 'phone from New Orleans just a while ago, Wednesday, and told me that the decision was that inasmuch as the jobbers were not particularly interested in Trace Chains at the present time, and with all the uncertainties of a war in the near future, etc., it was best not to obligate oneself to such low prices as 20-10-5% for Trace Chains for the coming season.

"*After a lot of discussion I understand they decided to carry on just the same as at present, and that is— anyone wanting to buy trace chains can buy them at 20-10-5% for immediate shipment, but no pledges for the future.* * * *" (Comm. Ex. 333). 771

Mr. Campbell, Sr. wrote to J. Shelton Hardison on April 12, 1939:

"Confidentially, the chain manufacturers at their meeting in New York last week; inasmuch as the two

days were taken up with tire chains, and we were all pretty well worn out, they thought the best thing to do on *Trace Chains was to have a meeting in New Orleans on Tuesday of the Convention.*

"*At that time they will decide on the price for the coming year, at least the public price for the coming year, on Trace Chain.* I think manufacturers all feel that we should raise the price, and we will all have to raise the price if we are going to make any money out of trace chains. * * * .

773 "*The manufacturers, after their meeting and decision in New Orleans, promised to wire me immediately just what their decision is, and then, of course we will act accordingly.* * * *" (Comm. Ex. 335).

As showing the detection of price-cutting by a member, is this letter of May 4, 1939, from George J. Campbell to his agent, Mr. Hardison:

"Just as you know how confidential and how friendly the various accounts are to one salesman and another, might state that we were called on the 'phone *by the President of our Institute* yesterday, and he read to us the exact prices and the exact contract that you submitted to us from Baldwin & Company.

774 "Someone in Baldwin & Company's employ gave the full information, and let a salesman of a competitive concern copy it, so that they had us right 'on the spot'. * * *.

"Under the circumstances, if we can get out of it, I would certainly refuse the shipment; but I suppose that inasmuch as we accepted it, we will have to carry it through. * * *" (Comm. Ex. 386).

On May 22, 1939, George J. Campbell wrote John K. Wilson, Jr.:

"Confidentially, of course—this information is not to be given out, excepting to your salesmen, and it is to be given to them with the utmost confidence.

"*At our meeting the other day in Cleveland, the understanding is that very shortly a new price list on trace chains will be given out for the coming season.*

"*The 7-8-2 traces will still be retained at the $57.50 list, but most of the other sizes will be zig-zag, and up a little bit. The discount that will be given out will be $57.50 less 20%, which will be a 5% advance*" (Comm. 776 Ex. 351).

On June 21, 1939, M. H. Campbell wrote John K. Wilson Co.:

"We received a telegram from Mr. Wilson, stating that Hodell was quoting 70-10-10-10% on Tie Outs, and to advise instructions to your office.

"Before we do this we thought we would contact Mr. Campbell, Sr., *who is at present attending a Chain Institute meeting in Niagara Falls, so that he may take it up with the various members and see if this quotation is general or whether it is merely isolated*, because we do not want to lower the discount again with this extra 10%, when it was so difficult to raise it. 777

"Also, we know that Hodell is in financial difficulties, and they really cannot be considered responsible as far as their quotations are concerned. We shall advise you as soon as we hear from Mr. Campbell" (Comm. Ex. 384).

Mr. George J. Campbell wrote John K. Wilson on July 5, 1939:

"Received a letter from the president of the Chain Institute regarding the prices on Trace Chains, and he advises that he knows where one of our neighbors here in York has refused to accept an order for a car of trace chains at 20-10-5%, adhering strictly to the 20-10% price" (Comm. Ex. 380).

On July 24, 1939, Mr. Campbell, Sr. wrote J. Shelton Hardison:

779 "I have written Jack Wilson today, stating that we sent in our resignation to the Chain Institute about a week ago, so that *we have no obligations whatever with the other manufacturers, and will endeavor to run our business on our own policy;* but of course I realize this means low prices for everybody, but the situation was getting to be impossible with the larger companies after our tire chain trade with some terrible prices, and I believe that we can even up matters by getting probably some better jobbers of theirs at much better prices *than the high price that they generally quote them.* The whole fight is most unfortunate but apparently unavoidable, because the Hodell Company also resigned about a month ago, and they are out with all kinds of prices to everybody, altho they cry at the
780 meetings about the losses they are sustaining, through the terrible prices that others are quoting, etc., etc." (Comm. Ex. 392).

On April 5, 1940, the Secretary of International Chain & Manufacturing Company wrote its agent John K. Wilson:

"We have just been advised that the other chain manufacturers are issuing a new discount on trace

chains, namely 20% instead of the published discount at the present time of 20-10%.

"*There is an endeavor to raise the prices preparatory to the time when the large volume of trace chain business will be booked during the summer.* We, of course, will follow suit and will try to send out notices to the trade tomorrow or Monday at the latest as we are as anxious as any of them to raise the price on this particular issue which as you know has always been a football and really is sold at a price that is much too low.

"I would advise that you inform your salesman of this change and to abide particularly by the 20% discount to give it a trial and see what happens. . . ." 782 (Comm. Ex. 390).

This last letter is interesting in view of the fact that the International Chain & Manufacturing Company was not an Association member at the time it was written, though it did rejoin the Association some two months later.

Shortly after International rejoined the Institute, its Mr. George J. Campbell, Sr. wrote Mr. Hamilton Hart:

"Might state, Ham, that the writer attended a meeting, a certain meeting, this past week and I feel sure there will be no further drop in the price of chain but would not be surprised if there was an advance shortly on some of the lines" 783 (Comm. Exs. 330, 311).

On May 1940, Mr. Campbell wrote the John K. Wilson Company that:

"I am going out to the meeting as I think I wrote to you on May 7, and, if everything is O.K. I will try to raise the price to 33⅓% on pound chain instead

of the present 10-5% and, if they all hold to it, why we can make a little money instead of taking these terrible losses" (Comm. Ex. 387).

On June 19, 1940, four days after Mr. Campbell's company had rejoined the Chain Institute, he wrote John K. Wilson:

"*At a meeting of the Chain Institute the other day, they all stated they were not accepting anything beyond October 1, and although I really believe we could continue on for the rest of the year at those prices, I don't think you had better make any proposition to anyone*
785 *of any prices beyond October 1 unless you hear further from us*" (Comm. Ex. 312).

On October 18, 1940, Mr. Campbell, Sr. wrote John K. Wilson, asking:

"Is there any way that you could trace or find out why the Home Hardware Company cancelled their order with us, because we had the most extreme low prices, all but the trace chains which we had at 20% off.

"*In having this checked by the Chain Institute, they advised us positively the order was taken at regular prices* and, from my conversation with them, I feel pretty sure they mean the American Chain Company secured the business and I cannot understand why they
786 should give us an order, then turn around and cancel it and give it to someone else at even money. It just doesn't make sense.

"I certainly would like to know if they bought their trace chains at 20% off or some little extra and, if they did buy it from the American Chain Company or not." (Comm. Ex. 328).

The preceding letters reveal clearly the cooperation given its members by the Chain Institute where prices were discussed and agreed upon and then disseminated by the members to their respective sales forces.

The Agreement on Prices

Paragraph Six: American Chain & Cable Company is the largest manufacturer of all three types of chain (R. 1164). American sends its prices and discounts and extras to its competitors each time the same are issued, and such competitors copy them and follow them and send a printed copy of the same prices, discounts and extras with their names on them to American. (Welded, R. 996; Weldless, R. 1027; tire-chain, R. 1029-1030 R. 1107, 1111-1112; 1190-1, 1214-5; 1246-1250; 1535, 1750-1753, 1974; 2016.) This operation completed their understanding on prices, discounts and extras. American generally leads off with any change in prices of any of the three types of chain (R. 1215). 788

When American raised its prices and a competitor received the change the quicker such competitor got out his prices to conform and into the hands of his competitors, the quicker he would be able to take advantage of such a raise in prices, for he would assume that his competitors would also take advantage of the raise. He could not well raise his prices until his competitors did the same (R. 1249). Effective cooperation among all the members was thus maintained. 789

The practice of a member in distributing its price lists among its competitors was to let the competitors know that the member was following the same price range set out in American's price list (R. 1247-8). The members exchanged their price lists with each other (R. 1752-3).

The Classification of Customers

It was important for respondents to know in what classes the different customers were placed and the discounts and extras pertaining to them.

On May 26, 1935, respondent American sent to respondents Hodell Chain Company, Columbus McKinnon Chain Corporation, Peerless Chain Company and other members of respondent Institute, a set of Jobber-Dealer, Dealer-Consumer, and Consumer price sheets at the same time asking these latter named respondents to send copies of their price sheets for American's files (Com. Exs. 153, 154, 35 and 39). Respondent Peerless responded by saying it
791 might be a week or so before they got theirs out, but they would send American Chain a couple of the first copies off the press (Com. Ex. 37). Respondent Nixdorff-Krein wrote, thanking American and saying American could be assured of receiving copies of their catalogs as soon as they were off the press (Com. Ex. 38). Respondent Peerless asked American for a copy of its discount sheet, channels of distribution, etc., (Com. Ex. 37) to which request American responded by sending its Jobbers' sales agreement for the 1939-1940 season and a copy of its channels of distribution, and asking Peerless to send similar information when the same was ready (Com. Ex. 36). When American received these documents in exchange from its competitors, the agreement as to classification of customers
792 was complete. See appendix A consisting of five sheets demonstrating the absolute uniformity of classified customers and the discounts allowed to each, a miracle which could only be reached by agreements here depicted.

Respondent American sent a copy of its new tire chain sheets to respondent Western Chain Products Company and received the assurance of Western Chain that its catalog sheets should be available very shortly (Com. Ex. 142).

Mr. Kirkpatrick, on cross-examination, was asked why he asked the Peerless Company for a copy of their jobbers' sales agreement and a copy of their channels of distribution and their price sheets, and he replied that he wanted to know always what the competitor is doing (R. 1450-1).

Without getting together on these phases of price, it would hardly have been possible for the members of the Institute to reach the same uniform prices, discounts and extras, and consequently there would have been no agreement on prices. Agreements were therefore entered into by and between the members as to classification of customers and as to the prices, discounts and extras which were charged their customers by the members of the Institute. 794

There were the so-called price wars testified to in this proceeding, but these related only to sales to automotive chains, chain stores, Sears-Roebuck, etc., who received lower prices than the jobber (R. 1876, 2012-13).

Basing Point Methods of Pricing Result From Reciprocal Agreements

It was stipulated between attorneys for the respective parties in this case:

"With respect to the type or types of chain it manufactures and/or sells, each Respondent Member, with the *knowledge that other Respondent Members simultaneously do likewise*, uses the applicable basing point, multiple basing point and/or delivered pricing practices and methods hereinafter more fully described in PARAGRAPHS NINE, TEN AND ELEVEN HEREOF" (R. 619). 795

A later stipulation provided that the published list prices published discounts and published extras as to each product were the same in the case of all members, and that the sales of the members were made in accordance therewith (R. 872-875).

There is the *reciprocal agreement*, which is a *contract of mutual understanding*. Every one who enters into it knows that such contract violates the Sherman and Federal Trade Commission Acts, because it fixes prices and thereby eliminates price competition; in so doing, it also causes the unlawful discriminations prohibited by the Clayton Act.

The three pricing systems used in the respective three types of chain in this case are the result of cooperation and agreement among the members of the Institute. After each pricing system was established, no discussion is needed by anyone entering into it, because the systems are self-operating (R. 1850, 2031).

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Mr. Bond, Vice President of the McKay Company, explains how the pricing system on weldless chain was started:

> "The weldless chain is made by only a few manufacturers and as they originally came into being, they had to compete with each other.
>
> "Let's assume there were just originally two locations, say Bridgeport and Cleveland. *They just had to do something if they wanted to sell in the other fellow's territory, so they would equalize freight with each other.* Then, some other point would come into being, such as York, Cincinnati, whatever it may be. That would be added to the scheme of things so that when
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>
> we got into the picture there were the four basing points."

No one will doubt but that these two manufacturers had to *agree* to equalize freight as neither would otherwise permit competition in his own territory, so they started out with this reciprocal agreement or mutual understanding in violation of the Sherman, Federal Trade Commission and Clayton Acts. Mr. Kirkpatrick, Vice President,

American Chain & Cable Company, testified that there were discussions among the members *at meetings* and elsewhere as to prices that were charged and cutting of prices by any of the members on closed and past transactions (R. 1452). The purpose of that, if it could be accomplished, Mr. Kirkpatrick testified, was to get the members in line, to bring them down to stabilization of prices among themselves (R. 1452). They attempted to get all the information they could to stop price cutting.

A number of respondents' witnesses testified to discussions of past and closed transactions as though such discussions were free from criticism. We shall show later they are only free where there is no element of that agreement in prices present in this case. 800

Competition

Witnesses for respondent freely testified that their plants had increased in volume and space enormously throughout the years under the pricing systems here involved, and that such a result indicated competition. Yes, for *business*, but not *price competition*. The prosperous practice under three systems had one common result—the utter elimination of price competition. The evil result of non-competitive prices under the three systems enabled the leader, the American Chain & Cable Company, to fix prices on chain high enough so as to enable the highest cost producer to sell chain at a profit throughout the United States, and thus to provide much greater profits to the larger low cost producers. Only one respondent furnished the actual figures covering its growth. The others refused on the ground that they did not wish to publish the figures. There is a wide difference in profits made by the several manufacturers due to the greater volume of production. The greater the volume the less the cost of production (R. 1854, 1871, 2036). 801

The pricing systems used by respondents are of great benefit to the respondents and to the jobbers, their customers. The consumer's interest is not considered (R. 1875). Mr. Duncan, attorney for respondent American Chain & Cable Company, testified on cross-examination that a consumer would naturally buy where he could get an article the cheapest (R. 2229). But the trouble with these pricing systems is that the consumer is not considered and he is not given more than one price and he must take that or do without. Mr. Duncan was asked why couldn't a company sell chain on the Atlantic coast at one price and on the Pacific for 25¢ more. He could not answer that (R.
803 2232).

Price cutting existed only during depressions (R. 1881).

Cleveland Chain started out with an initial capital of $20,000 but would not sell out for $3,000,000 today (R. 1905).

Freight absorption is offset by the phantom freight the chain producers take from their customers (R. 1907). Certain customers are thereby heavily penalized who have to pay for freight absorption by the producers.

National Distribution v. *Cheaper Cost to Consumers*

Mr. Kirkpatrick, Vice President of American, testified that if they were forced to sell their welded, weldless or tire chains on an f.o.b. factory basis from their plant at
804 York, Pennsylvania, it would be very difficult for American to have *national distribution* because the freight from York to the various distant points would enable the consumers to buy from American's competitors at a *cheaper price f.o.b. their competitors' mills* (R. 1312-1314). That is precisely the situation. In order that all manufacturers have the right to distribute their products in an artificial and uneconomical manner over the entire United States, they must get higher prices which will permit them to do so

The pricing systems herein involved enable producers to fix their chain prices accordingly.

In responding to invitations to bid by the United States Navy for material which the Navy required in the prosecution of the war, reference is here made to Commission's Exhibits illustrating the general uniformity of such bids:

COMMISSION EXHIBIT 947:

Three bids: Item 1. American, Bridgeport, Cleveland, McKay and Seattle all bid $32.63, Taylor not bidding.

Item 2. American and McKay bid $45.38, while Bridgeport, Cleveland and Seattle bid $45.39. 806

Item 3. American and McKay bid $60.56, while Bridgeport, Cleveland and Seattle all bid $57.10.

COMMISSION EXHIBIT 951:

19 Bids: American, Bridgeport, Hodell and Taylor quoted identical prices in each bid, while Russell quoted prices just high enough so he would not get the bid, and Turner & Seymour quoted for the most part .0023¢ higher than the bids of the other respondents for the same reason. The evidence shows that it was the practice of such respondents who did not want to participate in the bid, to submit a high bid so that they could keep their names on future lists of bidders 807 (Comm. Ex. 887-B).

COMMISSION EXHIBIT 953:

22 items on which bids were made. The bids from American, Bridgeport, Turner & Seymour and Hodell were identical. Respondent Russell bid just high enough to avoid winning award.

COMMISSION EXHIBIT 955:

Nine items on which bids were made. On four of the items, the bids of Cleveland, Bridgeport, Hodell, Round and Seattle were identical. American and McKay were slightly lower, while Western was slightly lower than any of the bidders and won the award. On five of the items, the bids of American, Cleveland, Bridgeport, and Round California were identical, while Hodell, Russell and Turner & Seymour obviously bid slightly higher so as not to get the bid.

COMMISSION EXHIBIT 957:

809 Two items. One item McKay, Round, Seattle, Bridgeport and Cleveland bid $48.43. American bid $48.33; Columbus McKinnon $48.17; S. G. Taylor Chain Co. $37.95.

On the other item, American and McKay bid $64.42; Columbus McKinnon $64.29, Round, Seattle, Bridgeport and Cleveland each bid $64.63, S. G. Taylor Co. $60.95. Award made to Taylor.

COMMISSION EXHIBIT 959:

Item 2—American, Bridgeport, Cleveland, McKay and Columbus McKinnon each bid $0.1434.

Item 3—All five companies bid $0.1359.

810 Item 2-a—All five bid $0.1413; while Taylor bid 1264.

Item 4-a—Four bid $0.1238, while Taylor bid $.1114.

Item 3-B—All five, American, Bridgeport, Cleveland McKay and Columbus McKinnon all bid $0.1438.

Item 1-c—American, Bridgeport, Cleveland and Columbus McKinnon bid $0.0955, while The McKay Co. bid $0.0953.

Item 2-c—American, Bridgeport and Cleveland bid $0.1405, while the McKay Co. bid $0.1403.

Item 3-c—American, Bridgeport, Cleveland and Columbus McKinnon bid $0.1330, while McKay bid $0.1328.

Item 4-c—American, Bridgeport and Cleveland bid $0.1230, while McKay bid $0.1228.

Item 2d—All five bidders bid $0.1353.

Item 1-e—American, Bridgeport, Cleveland and Columbus-McKinnon bid $0.0966, while McKay bid $0.978.

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Item 3-e—American, Bridgeport, Cleveland and Columbus-McKinnon bid .1341, while McKay bid .1353.

Items 2-f, 3-f and 4-f all bids were exactly identical, being $0.1463, .1388 and .1288 respectively.

Items 1-g, 2-g, 3-g and 4-g, all five respondent producers bid alike, namely $0.1027, .1477, .1402, and .1302 respectively.

Item 1-h—All bidders bid $0.1119 except Columbus-McKinnon, which bid $0.1108.

COMMISSION EXHIBIT 961:

25 items on which the bids of American, Bridgeport, Cleveland, and Turner & Seymour were identical, all bids being in four fractions of a cent. 813

COMMISSION EXHIBIT 963:

Item 1—American, Bridgeport, Columbus-McKinnon, and Seattle all bid $32.56, while McKay bid $30.32.

Item 2—American, Bridgeport, Columbus-McKinnon and Seattle all bid exactly the same, while McKay bid $41.50.

Item 3—All first four above named companies bid exactly the same price of $60.44, while McKay bid $55.78.

COMMISSION EXHIBIT 965:

Items 2 to 4-3 inclusive, consisting of 15 items: The McKay Co., International Chain, Seattle Chain, Bridgeport Chain, American Chain, Nixdorff-Krein all bid the identical prices of .1281, .1226, .1071, .1216, .1051, .1266, .1211, .1056, .1275, .1065, .0939, .1264, .1209, .1054. Western Chain Products Co., and Columbus-McKinnon made lower prices by fractions of a cent.

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COMMISSION EXHIBIT 966:

Item 2—American, Cleveland, Seattle, Taylor-Parker, using American products and Bridgeport used the identical price of 0.0215.

Item 3—American and Taylor-Parker quoted .0269, while Cleveland Chain, Seattle, Turner & Seymour and Bridgeport quoted $.027.

Item 4—American, Taylor-Parker, Turner & Seymour quoted .0431, while Cleveland, Seattle and Bridgeport quoted .047.

Item 1-a—Six respondent companies quoted the identical figure of .0171.

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Item 2-a—Ten companies quoted the identical figure of .0213.

Item 3-a—Nine companies quoted the identical figure of .0267.

Item 4-a—Nine companies quoted the identical figure of .0427.

Item 2-b—American quoted .0215, Cleveland, Seattle and Bridgeport quoted .02148; Turner & Seymour quoted .0216.

Item 3-b—American quoted .0267; Cleveland, Seattle and Bridgeport quoted .02694 and Turner & Seymour quoted .0269.

Item 4-b—American and Turner & Seymour quoted .043; Cleveland, Seattle and Bridgeport quoted .04305, and Russell quoted .0437.

Item 2-c—American and Turner & Seymour quoted .0216, while Cleveland, Seattle and Bridgeport quoted .02156; Russell quoted .0213. 818

Item 4-c—American quoted .0432, while Cleveland, Seattle and Bridgeport quoted .04323.

The same results are apparent in items 1d, 2d, 3d, 4d, and 2e, namely American bidding alone, while Cleveland, Seattle and Bridgeport are identical, and Turner & Seymour is slightly under American.

The Institute's Freight-Rate Book

The Chain Institute employed one Charles Donley to compile freight rates for use in pricing welded chain. On May 26, 1938, F. A. Bond, Chairman of the Traffic Committee, reported to the Institute that the revised freight schedules were about ready for distribution and were being, 819 or had just been, mailed by Mr. Donley to the members. In connection with the distribution of the revised schedules, the Secretary was instructed to send one copy to each of the *non-member manufacturers* of welded chain. Comm. Ex. 227-A.

The respondents introduced evidence that non-members of the Institute were using the same pricing system as

were the respondents, which accounts for the necessity that they be furnished with the same freight rates as were the respondents.

This Donley freight rate compilation sent to all the members and the *non-members* was not intended to serve any need for freight rates for shipping purposes but is designed for their use in pricing under the basing point system in effect with respect to welded chain prices (R. 612).

Since so many freight rates have been changed in the past year, the present compilation is in need of revised sheets covering such changes (R. 2332, 2335). Meanwhile
821 a number of the members are using traffic bureaus to furnish rates to them, which bureaus no doubt furnish the same rates to all members and non-members applying to them. The Chairman of the Traffic Committee could not commit himself as to when the revised sheets to the freight rates would be compiled by the Institute, though his Company is still using the Donley rates, and he testified that within reasonable limits Mr. Donley would furnish any later rates to any members calling upon him for same (R. 2334-7; 2345).

Inasmuch as the freight rates furnished by this freight rate book have been instrumental as a uniform, arbitrary price factor in the prices fixed by agreement on welded chain, there is no assurance whatever that such revisions
822 will not be made from time to time.

Mr. Merriman

On July 1, 1938, Mr. George J. Campbell, Sr. President of International Chain & Manufacturing Company, wrote its agent, H. G. Reinicker:

> "This is unusually confidential, and wish you would keep it to yourselves, that we are figuring around on a

new man to run the industry, something like a Judge Landis, or a moving picture boss, or something like that, that can hold the 'brothers' more in line than they have been in the past; and we have left the matter to a committee, of which I am one of the members, to decide between two very good men; so that I think that things are moving in the right direction *for the stabilization of prices in the industry*. They are all pretty well sick of the present situation, with no business and low prices" (Comm. Ex. 357, p. 2).

On July 11, 1938, Mr. Campbell again wrote Mr. Reinicker:

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"Confidentially, Harry, I am going out with a committee of two other men from the larger manufacturers, and one of which is in fact, it is American Chain and Columbus McKinnon—Mr. Kirkpatrick and Mr. Brisbin—to get in touch with Dennis Merryman (sic) who was let out of the American Steel & Wire Company a short while ago, to see if we can get him, or persuade him, to act as the 'Judge Landis' of the Chain Industry.

"I hesitate to do anything now, after having been placed on this committee, and am going out to Chicago to see this fellow, until I have a talk with him to see if we can persuade him to take the job, and also if we can persuade him to act a little sharp on any such practices as is (sic) now going on in the industry. This 825
means, of course, if it goes through, *that I will have to live up to the regular prices*, but I think we can afford to do that now, rather than have all those tens and fives and make no profit after we get the business. • • • Am leaving York on Tuesday night and will be back the following Saturday, and I will have something definite by that time" (Comm. Ex. 349-A).

Mr. Merriman shortly thereafter became Managing Director of Respondent Chain Institute, and still retains that office.

The Committee appointed to interview Mr. Merriman was authorized at the Institute meeting held July 28-29, 1938, to conclude arrangements with Mr. D. A. Merriman as Counsellor, on the basis of starting at $6,000 per year, effective August 1, 1938 (Com. Ex. 225-D). One of the other members of the Committee also had a habit of referring to Mr. Merriman as a "Judge Landis".

With Mr. Merriman's appointment, members complained
827 to him about the cutting of prices by some other member. Mr. Merriman would ask the members accused if he had done so, and the member would tell if he had. Mr. Merriman would report to the member who made the charge (R. 1102-3; 1115-17; 1225-7; 1336-38; 1382-7; 1646; 1749; 1764-5; 1453-4; 1977-79; (2073-2075). Mr. Merriman was hired for the purpose (R. 1880). Mr. Merriman was advised by counsel for the respondents that the members could discuss past transactions and he so advised the members (R. 2085). That, however, is not the law where members are cooperating, as we shall show.

The discussions of past transactions was to deter the members from cutting the fixed prices.

828 *American Chain & Cable Company and Its Licensees*

Respondent American Chain & Cable Company as licensor, entered into agreements with McKay, Pyrene, Hodell, St. Pierre and S. G. Taylor as licensees, all relating to Tire Chains embodying the anti-skid bar reinforced link features covered by American's patents. The agreement with McKay was terminated by the latter on February 6,

1939 (R. 615). The agreements provided that said licensee manufacturers at their option might either manufacture their own bar reinforced links or have the same manufactured for them by American, which latter practice was followed by all the licensees except McKay. The bar reinforced tread chain parts that were supplied by American were in rough unfinished form; they were unhardened, unpolished and unplated and consisted simply in short lengths of three or four reinforced treated links without end-connecting hooks. Before the links so supplied could be adapted to any useful purpose, extensive work and processing was required on the part of the licensees. These several steps were performed by the licensees. Said agree- 830
ments with American contained the provision whereby the said licensees were required to observe minimum prices and discounts in selling chains covered by the licenses, which provision was cancelled and released by American in December, 1942, prior to the filing of the amended complaint herein, but long after the Commission's investigation of the respondents had begun (R. 615-6).

Each of the respondents, American, McKay, Pyrene and Hodell, entered into an arrangement during 1937 with Respondents Shirley, Olcott and Nichols, co-partners trading under the firm name of Shirley, Olcott and Nichols, hereinafter referred to as Shirley, by which it was provided that Shirley was to act as manufacturers' sales representative in the sale of Tire Chains manufactured by Respond- 831
ents American, McKay, Pyrene and Hodell (R. 617). Shirley was to receive orders for Tire Chains embodying the patented anti-skid bar reinforced feature from various agencies of the Federal Government through the Procurement Division of the Treasury Department. Shirley was then to select one of said respondent manufacturers to fill and ship said order. Respondent Shirley would receive payment for said chain and would then remit their check

for the amount of the invoice, less a deduction of 7½% of the payment retained by them as their profit on the transaction (R. 617).

Respondents St. Pierre and Taylor became parties to said arrangement on January 1, 1940. Pursuant to said arrangement, Respondent Shirley from time to time during the years 1937 to 1942, inclusive, submitted bids on Tire Chains embodying the said patented anti-skid reinforced feature. After contracts were awarded Respondent Shirley, the federal agencies for whom such contracts were let, submitted orders direct to respondent Shirley. This arrangement was accepted by officials of the Procurement
833 Division. Government agencies sent to Respondent Shirley orders for *unpatented* tire chains as well as tire chains with the patented reinforced links. The said licensees extended their arrangement with Shirley to cover all types of Tire Chains, and Shirley thereafter from 1939 to 1942, inclusive, handled unpatented Tire Chains in the same manner as they had previously handled the reinforced Tire Chains (R. 617-9).

During the time that said arrangement with Respondent Shirley was in effect, the Respondent Manufacturers whose chains Shirley was then handling and other Respondent Manufacturers submitted bids from time to time directly to the Government on Procurement Division contracts, covering either unpatented or patented reinforced Tire
834 Chains, or both (R. 619).

Said arrangement with Respondent Shirley was terminated by each of the Respondent Members then a party thereto on October 15, 1942 (R. 619).

There appears to be no question but what the so-called licensor and licensees agreed upon the prices and discounts to be quoted the Government on the Procurement Department contracts, although they ostensibly bid sepa

rately, notwithstanding that each bid was accompanied by a warning in bold type, as follows:

"THE UNDERSIGNED REPRESENTS THAT THE PRICES STATED IN THIS BID ARE NEITHER DIRECTLY NOR INDIRECTLY THE RESULT OF ANY AGREEMENT WITH ANY OTHER BIDDER."
(For instance, Com. Ex. 903-C.)

While the Procurement Department was in favor of placing orders with Shirley, Olcott & Nichols who were representing all the licensees and the licensor, yet there is not the slightest evidence that the Department knew that the bids by these parties were agreed upon beforehand.

836 James D. Head, while he was acting chief counsel for the Procurement Division in the Treasury Department from June, 1938 to July, 1939, caused a memorandum to be prepared and sent to Thomas A. Manning, Jr., Assistant to the Chief Counsel for the Treasury Department concerning bids made to the Procurement Department by the licensor and four licensees and Shirley, from which the following quotation is taken:

"The evidence presents such strong inferences of collusive bidding and of a combination in restraint of trade that it should, in my opinion, be brought especially to the attention of the Federal Trade Commission and the Attorney General with a view to possible proceedings under the antitrust laws. . . .
837 The last four of the listed bidders clearly appear . . . to have submitted a *combined* bid through Shirley, Olcott & Nichols, and to have quoted slightly higher prices in bidding individually in order to give the *combined* bid priority. While Shirley, Olcott & Nichols could conceivably be a *bona fide* dealer in the products of all four manufacturers, and could have submitted a legitimate bid without having participated

in any collusive arrangement with them, the inference is strong that the four manufacturers combined and bid through this dealer in order to obtain an advantage in distribution facilities, and that any appearance of competition among them is merely fictitious * * *" (Comm. Ex. 887-B).

On one of the above mentioned bids, American and its three licensees bid the list price less a discount of 57.989%; 57.986%; 57.989%, and 57.988%, respectively (Comm. Ex. 895 i, 897 h, 896 h, and 899 p), while Olcott & Nichols bid list with a discount of 58% (Comm. Ex. 897-J), and won the bid.

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All other bids showed collusive agreement. An award was made by lot where the bids were all the same (Comm. Ex. 891 A to W).

On March 22, 1938, Shirley wrote one of the licensees:

"* * * As you explained to me, you had talked this matter over with the Industry and it would be agreeable to them to advance their discounts a little and let me quote the regular price and the business automatically be awarded to us. * * * I believe it was our understanding that you would take this matter up with your friends and that it was your purpose for me to state in my bid that I propose to furnish chains
840 manufactured by the Hodell, American and Pyrene Chain companies and any other companies that you suggest, stating that we reserve the right to ship these chains from the most advantageous warehouse to the point of destination. * * *" (Comm. Ex. 302 A).

The latter part of this understanding was incorporated into Shirley's bid (Comm. Ex. 893 M-N) contained in the *award* to Shirley (Comm. Ex. 893 A to V).

Carrying out the arrangement mentioned above, Shirley was awarded the contract for both patented and unpatented tire chains in a contract covering the period from January 1 to December 31, 1939 (Comm. Ex. 901 A to Z). The same thing happened as to another contract (Comm. Ex. 909 A-T). Although the McKay Company had terminated its contract with the licensor, American, in February, 1939, it continued to bid with the other licensees, including the case of this contract.

Shirley was again awarded the contract (Comm. Ex. 930 A to Z) where he bid all or none on both the standard and reinforced tire chain. The opening date of the bid was April 23, 1941. Shirley had incorporated this "all 842
or none" plan in a letter to W. D. Kirkpatrick of American on September 22, 1939, where he said:

> "The new chain schedule will be out very shortly and open some time the early part of October, and I am very anxious to have a talk with you and Ted or Mr. Hodell before the prices are quoted. About the only way we can get this business for the bar reinforced industry is to quote about 10% high on bar reinforced chains and permit me to quote the usual price on both standard and bar reinforced chains and couple the two items together on a basis of all or none and in this way you can keep this chain business in your own hands." (Comm. Ex. 158).

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On bids submitted by Shirley and the licensor and licensees, date of opening, April 19, 1940, for the period of July 1, 1940 to June 30, 1941, covering standard and reinforced chain, they had considerable competition from other respondent members. Shirley filed the lowest bid as between him and the licensor and licensees, but International Chain & Manufacturing Company, which was not a licensee of American, quoted the same prices on standard

and reinforced chain as did Shirley. Noland Company, Inc., however, quoted a lower price on standard chain. Because of the watchfulness of C. O. Saylor, a purchasing officer of the Treasury Department, Procurement Division, Noland was awarded the contract on standard chain, and International was awarded the contract on reinforced chain. (See Tabulation of Bids, Comm. Ex. 929 A-D). In a Memorandum for the File prepared by Mr. Saylor on June 1, 1940 (Comm. Ex. 942 A-B), he wrote:

"It should be noted, however, that those six firms (licensor and licensees) make no effort to compete, merely submitting complimentary bids, all of which
845 are higher than that of Shirley, Olcott & Nichols. The net result is the removal from competition of the *dominant* portion of the industry and to make an award to Shirley, Olcott & Nichols on a basis of distribution, *regardless* of price, can only result in the elimination of all competition on this item. It is therefore considered to the best interest of the Government to award Item S-C-1000 to Noland Company, the low bidder (standard tire chain).

"On item S-C-3450 (reinforced chain), the low bidder's sample failed to meet the specification. The bids of Shirley, Olcott & Nichols and the International Chain Company were the next low and were equal, but the bid of Shirley, Olcott & Nichols is based on
846 receipt of both items of chains with the award of separate items subject to their acceptance. However, to permit them to exercise this acceptance would be prejudicial to the rights of the International Chain Co. who submitted an equally low but unqualified bid. It is therefore recommended that the lowest acceptable and unqualified bid be accepted."

Mr. Saylor's recommendations were followed (Comm. Ex. 939 A and 939 C). Noland Co., Inc. and International Chain were awarded the contracts.

American and its licensees, Pyrene and its erstwhile licensee The McKay Company who still continued to bid with the licensees on these contracts, and Shirley, all bid the identical discount of 53½% from a uniform list price on both standard and reinforced chain. Shirley and McKay received dual awards on the standard and reinforced chains because of the existing emergency (Comm. Exs. 936 A-Z 35 and 937 A-Z 23). The date of opening of bids was December 1, 1941. On November 17, 1941, American's sales manager, in a letter to its licensees relative to this contract, 848
stated:

> "Our thought would be that we should send our present catalog showing the 1941-42 prices and from this allow Shirley to quote the 53½%".

In answer to this letter, Pyrene, St. Pierre and Taylor expressed agreement (Comm. Ex. 97, 98 and 99).

In a letter of November 26, 1941, the Sales Manager of American's Auto Accessories Department wrote Shirley, et al., that "Acting as agent for our group of licensees we wish you to bid 53½% from catalog prices, delivered."

Thus, the collusion between American as licensor and its licensees has been clearly shown. No relation existed 849
between American and its licensees whereby American had any legal right to dictate prices at which the licensees were to sell their unpatented tire chains.

No respondents herein other than the licensees of respondent American Chain & Cable Company signed the license agreements with American herein mentioned.

850 *Proposed Findings as to the Facts.*

Past Transactions

PARAGRAPH SEVEN: While the evidence shows the heated discussions among the members over the cutting of prices by the members at times, it appears that the attorney for respondent Institute advised the Institute members that they could discuss past transactions as to their prices without violating any of the anti-trust laws. However, the case of Maple Flooring Association v. U. S., 268 U. S. 573, 586, held that

> "We decide only that trade associations • • • which openly and fairly gather and disseminate information as to • • • the actual price which the product has
851 brought in past transactions, • • • and who, as they did, meet and discuss such information and statistics without however, reaching or attempting to reach any agreement or any concerted action with respect to prices • • • do not thereby engage in unlawful restraint of commerce."

But such course of action is a far cry from that used in the case at bar where the representative of American in discussing prices, tells the members what American is going to do if the price cutting is kept up, and when members engage in bitter discussions as to past prices in the expectation that such discussions will in the future deter any further price cutting (Comm. Exs. 84-B, 91).
852 The evidence showing Mr. Merriman's connection in attempting to "stabilize" prices and the evidence of the respondent members as to the heated discussions which were had among the members as to past transactions leaves little doubt as to the real purpose of such discussions.

The Conspiracy

PARAGRAPH EIGHT: Aside from the evidence of conspiracy shown by the record and hereinabove referred to, such as the close cooperation given by respondent Institute to its members in the maintenance of prices, and the close cooperation among the members themselves in forcing a maintenance of the delivered prices, the existence of a conspiracy is also shown by the fact that all of the respondents entered into it with full knowledge that when they did they were conspiring to eliminate price competition among themselves and consequently violating the Sherman Act and the Federal Trade Commission Act as well as the Clayton Act. 854

In *William Goldman Theatres, Inc.* v. *Loew's, Inc., et al.*, 150 F. 2d, 738, 745 (C. C. A. 3rd, August 2, 1945), the Court said:

> "Uniform participation by competitors in a particular system of doing business where each is aware of the others' activities, the effect of which is restraint of interstate commerce, is sufficient to *establish an unlawful conspiracy under the statutes before us.*"

In a similar case, *Bigelow, et al.* v. *RKO Radio Pictures, Inc., et al.*, 150 F. 2d 877, 882-3 (C. C. A. 7, August 3, 1945), the Court, stating that no specific agreement was proven, held it was not necessary, adding: 855

> "*Knowing participation by competitors without previous agreement in a plan, the necessary consequences of which if carried out is unreasonable restraint of interstate commerce, is sufficient to establish an unlawful conspiracy.*"

The above two cases were decided within a day of each other, but in separate circuits.

In *United States Maltsters Association, et al.* v. *Federal Trade Commission*, 152 F. 2d 161, 164, 165 (C. C. A. 7th, November 7, 1945, where 18 manufacturers of malt and their trade association were charged with a conspiracy to fix prices, the Court said:

> "We are of the view that the Commission's findings that a price-fixing agreement existed must be accepted; any other conclusion would do violence to common sense and the realities of the situation. The fact that petitioners utilized a system which enabled them to deliver malt at every point of destination at exactly the same price is a persuasive circumstance in itself.
>
> 857 • • •
>
> "It is pertinent to note that when one member announced a discount to customers, all other members announced exactly the same discount." • • • (As in the case at bar.)

The Stipulations.

The stipulations appearing at pages 871 to 878 of the record admit on behalf of respondents at least 80% uniformity of prices in all types of chains, while we contended the uniformity was 95%. At the hearings it developed that the price wars which occasioned some divergence of prices among the respondents during times
858 of depression only affected those special customers who received special discounts and whose invoices we did not analyze. We considered that special customers' prices were not comparable to the prices paid by the jobbers because the prices were lower to these special customers. And our view of the matter was borne out by the testimony of Mr. Bouncher as hereinabove recited. As in the case of all companies using a basing point system, as illustrated by a quotation taken by us and repeated herein, from the

Cement case, the same lack of uniformity in prices appears in times of depression to the Chain Industry.

And as the Court held in *Phelps Dodge Refining Co.* v. *Federal Trade Commission*, 130 F. 2d 393 (C. C. A. 2, 1934):

> "This agreement need not be proven by direct evidence; conduct pointing to concerted action is sufficient."

COUNT II

The three pricing systems used in this case inevitably produce discriminatory prices by the respondents in the 860
sale of their chain which are not the result of making due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which the chain is sold (R. 1009, 1021-2, 1027, 1144, 2019). Each of said systems also inevitably eliminates *price* competition.

The decisions of the courts are overwhelmingly against each of the systems.

In the case of the *single basing point system of pricing* used by the *welded chain manufacturers*, the Supreme Court has outlawed the practice in *Corn Products Refining Co., et al.*, v. *Federal Trade Commission*, 324 U. S. 726, where the Court held: 861

> "Petitioners' pricing system results inevitably in systematic price discriminations. • • • The freight actually paid by petitioners in making deliveries usually varies from the freight factor from Chicago, used in computing the delivered price. When the actual freight is the lesser of the two, petitioners charge and collect unearned or phantom freight; when it is the greater, petitioners absorb the excess freight which they pay, but

do not include in the computation of their delivered price. * * * The factory net varies according as petitioners collect phantom freight or absorb freight, and in each case in the amount of this freight differential. The price discriminations resulting from this systematic inclusion of the freight differential in computing its delivered price are not specifically permitted by the statute. Hence they are unlawful, unless, as petitioners argue, there is an implicit exception to the statute for such a basing point system." (The court found there was no such implicit exception.) "We conclude that the discriminations involved in petitioners' pricing system are within the prohibition of
863 the Act. We pass to the question whether these discriminations had the prescribed effect on competition." (The court held they did.)

In the case of *Federal Trade Commission* v. *Staley Co.*, 324 U. S. 746, involving another single basing point price practice, the Court said:

"The systematic adoption of a competitor's price by including unearned freight in respondents' delivery price, or, what amounts to the same thing, the maintenance of a discriminatory and artificially high f.o.b. factory price in order to take advantage of the correspondingly high price of a competitor, based on its higher costs of delivery, is not sufficient to justify the
864 discrimination, for respondent fails to show, as the statute requires, *the establishment of a lower price made in good faith to meet the equally low price of a competitor.* By adopting the price system of their competitors, *respondents have succeeded in many instances in establishing an artificially high price and have thus secured the benefit of the high price level of a competitor whose costs of delivery are greater.*

"A price discrimination is measured by the difference between the high price to one purchaser and the lower price to another. Respondent's price discriminations are not dictated by the lower delivery costs or lower delivery prices of their competitors. In none of the markets in which respondents had a freight advantage over their Chicago competitors did respondents reduce their prices below that of their competitors. Instead they met and followed their competitors' prices by prices rendered artificially high, by the inclusion of unearned freight proportioned to the amount by which their competitors' delivered costs exceeded their own. 866

"We cannot say that a seller acts in good faith when it chooses to adopt such a clearly discriminatory pricing system, *at least when it has never attempted to set up a non-discriminatory system, giving to purchasers, who have the natural advantages which they are entitled to expect over purchasers at a distance.* * * *

"Congress has left to the Commission the determination of fact in each case whether the person, charged with making discriminatory prices, acted in good faith to meet a competitors' equally low price. The determination of this fact from the evidence is for the Commission. * * * In the present case, the Commission's finding that respondents' price discriminations 867 were not made to meet a 'lower' price and consequently were not in good faith, is amply supported by the record, and we think the Court of Appeals erred in setting aside this portion of the Commission's order to cease and desist."

As the Court said in the recently decided case of *Federal Trade Commission* v. *The Cement Institute, et al.*, U. S. (1948):

"Thus the combined effect of the two cases (Corn Products and Staley) was to forbid the adoption for sales purposes of any basing point pricing system. It is true that the Commission's complaint in the Corn Products and Staley cases simply charged the individual respondents with discriminations in price through use of a basing point price system, and did not, as here, allege a conspiracy or combination to use that system. But the holdings in those two cases that Section 2 forbids a basing point price system are equally controlling here, where the use of such a system is found to have been the result of a combination. * * *"

869 (pp. 37-8).

As for weldless chain, the multiple basing point delivered price system is used in its sale. As the Court said in the *Cement* case, supra:

"The use of the multiple basing point delivered price system by the cement producers has been coincident with a situation whereby for many years, with rare exceptions, cement has been offered for sale in every given locality at identical prices and terms by all producers. Thousands of sealed bids have been received by public agencies which corresponded in prices of cement down to a fractional part of a penny. * * * (p. 28).

870 "During the depression in the 1930's, slow business prompted some producers to deviate from the prices fixed by the delivered price system. (As in the case at bar). * * * (pp. 28-29).

"The Commission was authorized to find understanding, express or implied, from evidence that the industry's Institute actively worked in cooperation with various of its members, to maintain the multiple basing point delivered price system; that this pricing system

is calculated to produce and has produced, uniform prices and terms of sale throughout the country; and that all of the respondents have sold their cement substantially in accord with the pattern required by the multiple basing point system. • • • (p. 31).

"The sales practices of these particular respondents, and perhaps of other respondents as well, were not at all times precisely like the sale practices of all or any of the others. For example, the Commission found that in 1929 all of the central California mills became basing points. (As in the case at bar.) There was evidence that the Institute's rate books did not extend to the states in which some of the California companies did 872
business. The Commission found that 'in Southern California the basing point system of pricing is modified by an elaborate system of zone prices applicable in certain areas'; that the California system does not require separate calculations to determine the delivered price at each destination, but that complete price lists were published by the companies showing delivered prices at substantially all delivery points. • • • (p. 32).

"What these particular respondents emphasize does serve to underscore certain findings which show that some respondents were more active and influential in combination than were others, and that some companies probably unwillingly abandoned practices and entered into the combination • • • " (p. 33). (As for instance 873
in the case at bar, Pyrene Manufacturing Company would have liked to go on a f.o.b. mill basis.)

"*For aside from the testimony indicating the differences in their individual sales practices, there was abundant evidence as to common practices of these respondents and the others on the basis of which the Commission was justified in finding cooperative conduct among all to achieve delivered price uniformity* • • • (p. 34).

"We sustain the Commission's holding that *concerted maintenance of the basing point delivered price system* is an unfair method of competition prohibited by the Federal Trade Commission Act. * * * (p. 34).

"We cannot say that the Commission is wrong in concluding that the delivered-price system as here used provides an effective instrument which, if left free for use of the respondents would result in complete destruction of competition and the establishment of monopoly in the cement industry. That the basing point price system may lend itself to industry-wide anti-competitive practices is illustrated in the following among other cases: *United States* v. *United Gypsum Co. et al.*, 333 U. S. ; *Sugar Institute* v. *United States*, 297 U. S. 553. *We uphold the Commission's conclusion that the basing point delivered price system employed by respondents is an unfair trade practice which the Trade Commission may suppress*" (p. 35).

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The multiple basing point delivered price system as described in the above opinion is in all essential particulars the same as the multiple basing point delivered price system used by such respondents in this case who either manufacture or sell weldless chain.

876 The Court in the *Cement* case above further held:

"Section 2(b) permits a single company to sell one customer at a lower price than it sells to another if the price is 'made in good faith to meet an equally low price of a competitor.' But this does not mean that Sec. 2(b) permits a seller to use a sales system which constantly results in his getting more money for like goods from some customers than he does from others.

We held to the contrary in the *Staley* case. There we said that the Act speaks only of the seller's lower price and of that only to the extent that it is made 'in good faith to meet an equally low price of a competitor.' The Act thus places emphasis on individual competitive situations rather than upon a general system of competition. *Federal Trade Commission* v. *Staley, supra,* at 173. Each of the respondents, whether all its mills were basing points or not, sold some cement at prices determined by the basing point formula and governed by other base mills. *Thus all respondents to this extent adopted a discriminatory pricing system condemned by Sec. 2. As this in itself was evidence of the* 878 *employment of the multiple basing point system by the respondents as a practice rather than as a good faith effort to meet individual competitive situations, we think the Federal Trade Commission correctly concluded that the use of this cement basing point system violated the Act. Nor can we discern under these circumstances any distinction between the 'good faith' proviso as applied to a situation involving only phantom freight and one involving only freight absorption. Neither comes within its terms* (pp. 39-40).

"We hold that the Commission properly concluded that respondents' pricing system results in price discriminations. Its finding that the discriminations substantially lessened competition between respondents 879 and that they were not made in good faith to meet a competitor's price are supported by evidence. Accordingly the Commission was justified in issuing a cease and desist order against a continuation of the unlawful discriminatory pricing system" (p. 40).

The same Court described the single basing point price system and the multiple basing point price system in these words:

"In the multiple basing point system just as in the single basing point system, absorption or phantom freight is an element of the delivered price on all sales not governed by a basing point actually located at the seller's mill. And all sellers quote identical delivered prices in any given locality regardless of their different costs of production and their different freight expenses. *Thus the multiple and single systems function in the same general manner and produce the same consequences—identity of prices and diversity of net returns. Such differences as there are in matters here pertinent are therefore differences of degree only*"
881 (pp. 13-14).

As for *tire chains*, respondents utilize a system of prices in which they treat the entire United States as one zone. All tire chains of the same type or size are sold at all points within the United States at one identical price charged by all respondents. All respondent manufacturers pay to the customer whatever freight the customer at destination pays on the tire chain consigned to him.

As the manufacturers deduct from their f.o.b. mill price the amount of freight they pay on every shipment, it is of course obvious that their mill nets are different by the difference in the amounts of freight they pay on such shipments. Respondents term this method of selling an eco-
882 nomic *necessity*, which statement cannot of course be substantiated. All that respondents can prove is that their system of identical prices, f.o.b. their mills, is a wonderful one in that it eliminates all price competition, and enables the producers to make any price they please, which price the consumer must pay or do without, for he is not given an opportunity to shop around for a better price which does not exist.

Each sale is one involving discrimination in price which does not make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such respondents' products are to their purchasers sold or delivered.

Respondents' Exhibit 54, page 4, shows that the freight allowed by all respondent manufacturers of tire chains per invoice for the month of October 1941, averaged 5.50% of the sales value of the tire chains. This 5.50% is added to the price charged for tire chains which the customers must pay (R. 1905). Thus for a system which produces absolutely uniform prices, by all respondents, the cost of producing such uniformity is actually borne by the innocent 884
customer. He pays the price of eliminating price competition in tire chains. He pays for losing his privilege of shopping among tire sellers for competitive prices. Respondents' exhibit 55-A franklin shows the absolutely identical prices at which tire chains are offered for sale by the respondents.

The Court in *Fort Howard Paper Company, et al.* v. *Federal Trade Commission,* 156 F. 2d 899 (C. C. A. 74, 1948), declared that the system of zone prices is an "enormous exaggeration" of the basing point system (p.). The Court held "the use of zones obliterated the necessity for the use of cumbersome railroad freight books (p. 994). Price for the crepe paper product is generally determined by mill price (f.o.b. with *'freight allowed'* which results in 885
an *identical delivered price to purchasers in each respective zone"* (p. 904). (In the case at bar, each customer in the United States is given the same price as every other customer in the country). The Court further held:

> "It is the agreement to fix prices in concert that renders the agreement illegal. *No formal agreement, however, is necessary to constitute an unlawful conspiracy.*

The essential combination or conspiracy may be found in a course of dealings or other circumstances as well as in any exchange of words. It is not the form of the combination or the particular means used, *but the result to be achieved* that the statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within the prohibition. *The American Tobacco Company, et al.* v. *United States,* U. S. , 887 decided June 10, 1946. True, the mere filing of price lists, or the use of pricing zones, or the existence of an identical or substantially similar price for a standard product is not conclusive evidence of an illegal conspiracy (citing cases). With these observations in mind, we pass to the question whether there was here an agreement to fix prices for the purpose and with the effect of restricting and eliminating price competition among these manufacturers and sellers of crepe paper in interstate commerce. * * * (pp. 905-6).

"To be sure, a keen competitor strives to meet a lowered price of a competitor immediately upon becoming aware of it, but he does not strive to and invariably 888 match a price which is higher than that at which he needs profitably to sell unless by express, or tacit agreement, all manufacturers have found existence to be less strenuous for all concerned by merely setting a price for three zones in the whole United States, and except for such (identical) zone differentials, discarding and ignoring the substantial item of freight. We are unable to comprehend a manufacturer's disdain of a natural advantage, utilizing the same to gain local

business, unless he were indoctrinated with the belief (or forced by superior economic competitors to align himself to concerted action of identical delivered prices), that elimination of all competition was economically preferable" (p. 906). (As was the case with respondent Pyrene Manufacturing Company in the case at bar which preferred to sell its product f.o.b. its mill, but whose Vice-President testified that his Company could not change its method of pricing its chain as long as its competitors were selling on a delivered basis) (R. 2032-4).

The court in the above case then quoted from another 890
case, *The Milk and Ice Cream Can Institute, et al.* v. *F.T.C.*, as follows:

"The Commission recognizes that this freight equalization plan was used by petitioners prior to the organization of the Institute. Such being the case, the fact still remains that it was employed by petitioners for the purpose of fixing the delivered price of their product and in such use price competition was eliminated or at any rate seriously impaired. On the face of the situation, it taxes our credulity to believe as argued, that petitioners employed this system without any agreement or plan among themselves."

"*We think the artificiality and arbitrariness of the* 891
zone structure is so apparent it can not withstand the inference of agreement. The Commission evidently could not believe that Wisconsin companies would deprive themselves of the natural benefit of location in the midwest, and proximity to the west, over eastern competitors, were it not agreed that they would have equal chance for the eastern business, where most of the crepe paper manufacturers were located. The

weight to be given the facts and circumstances, as well as the inferences reasonably to be drawn therefrom is for the Commission" (p. 907).

In the case at bar it would be just as easy to infer a conspiracy to fix prices as in the above case, but it is not necessary to prove conspiracy here. It is only necessary to show the discriminating prices made by respondents to their customers and to show that by *making such discriminations, respondents eliminate all price competition among themselves.* These facts have been amply proven. It has been clearly demonstrated that such discriminations do not
893 make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which chain is sold to the purchasers thereof.

Attached hereto, marked Appendix, is a statement of the uniform discounts allowed by 15 Manufacturers of Tire Chains to the different classes of customers noted. The method of mutual exchange of these discounts among the members of the Chain Institute is one of the best definite examples of conspiracy to fix prices shown by the record.

Respectfully submitted,

K. E. STEINHAUER,
Attorney in support of Complaint.

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May 14, 1948
KES:em

Filed May 18, 1948

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Appendix "A".

CHAIN INSTITUTE, INC. ET AL.—DOCKET 4878

Comparative Summary of Discounts Allowed by 15 Manufacturers on Tire Chains Sold to Each Class of Customers in the Various Channels of Distribution (Based Upon Latest Discount Policies in the Record Prior to October, 1941)

Standard Passenger Chains	Jobber	Mail Order and Chain Stores	National Tire and Oil Companies for Resale
American Chain & Cable Co., Inc.	50-7%	50-7%	50-7%
The Bridgeport Chain & Mfg. Co.	50-7%		
The Cleveland Chain & Mfg. Co.	50-7%		
Columbus-McKinnon Chain Corp.	50-7%	50-7%	50-7%
The Hodell Chain Co.	50-7%		
International Chain & Mfg. Co.	50-7%		
The McKay Co.	50-7%	50-7%	50-7%
Nixdorff-Krein Mfg. Co.	50-7%		
Pyrene Manufacturing Co.	50-7%	50-7%	50-7%
Round California Chain Corp., Ltd.	50-7%		
St. Pierre Chain Corp.	50-7%		
Seattle Chain & Mfg. Co.	50-7%		
S. G. Taylor Chain Co.	50-7%		
Western Chain Products Co.	50-7%		
Woodhouse Chain Works	50-7%		

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Standard Passenger Chains	State Governments and New York City	Federal Government
American Chain & Cable Co., Inc.	50-7%	50-7%
Columbus-McKinnon Chain Corp.	50-7%	50-7%
The McKay Co.	50-7%	50-7%
Pyrene Manufacturing Company	50-7%	50-7%

898 *Appendix "A".*

Factory or Warehouse Shipments	Semi-Wholesaler	National Industrial Consumers, Fleet Owners, Taxicab Companies, Bus Lines and Other Common Passenger Carriers	Municipalities, Counties, C C C Camps, etc.
American Chain & Cable Co., Inc.	40-10%		40-10%
The Bridgeport Chain & Mfg. Co.	40-10%	40-10%	40-10%
The Cleveland Chain & Mfg. Co.	40-10%	40-10%	40-10%
Columbus-McKinnon Chain Corp.	40-10%		40-10%
The Hodell Chain Co.	40-10%		40-10%
International Chain & Mfg. Co.	40-10%	40-10%	40-10%
The McKay Co.	40-10%	40-10%	40-10%
Nixdorff-Krein Mfg. Co.	40-10%	40-10%	40-10%
899 Pyrene Manufacturing Company	40-10%		40-10%
Round California Chain Corp., Ltd.	40-10%	40-10%	40-10%
St. Pierre Chain Corp.	40-10%		40-10%
Seattle Chain & Mfg. Co.	40-10%	40-10%	40-10%
S. G. Taylor Chain Co.	40-10%	40-10%	40-10%
Woodhouse Chain Works	40-10%	40-10%	40-10%
Jobbers' Stock Shipments			
American Chain & Cable Co., Inc.	40-5%		40%
The Bridgeport Chain & Mfg. Co.	40-5%	40%	40%
The Cleveland Chain & Mfg. Co.	40-5%	40%	40%
Columbus-McKinnon Chain Corp.	40-5%		40%
The Hodell Chain Co.	40-5%		40%
International Chain & Mfg. Co.	40-5%	40%	40-5%
The McKay Co.	40-5%	40%	40%
Nixdorff-Krein Mfg. Co.	40-5%	40%	40%
900 Pyrene Manufacturing Co.	40-5%		40%
Round California Chain Corp., Ltd.	40-5%	40%	40%
St. Pierre Chain Corp.	40-5%		40%
Seattle Chain & Mfg. Co.	40-5%	40%	40%
S. G. Taylor Chain Co.	40-5%	40%	40%
Woodhouse Chain Works	40-5%	40%	40%

Appendix "A".

901

One to Nine Pairs	Mail Order and Chain Stores	Dealers and Small Fleets Under 50 Vehicles	National Tire and Oil Companies for Resale
American Chain & Cable Co., Inc.		30-5%	
The Bridgeport Chain & Mfg. Co.		30-5%	
The Cleveland Chain & Mfg. Co.		30-5%	
Columbus-McKinnon Chain Corp.		30-5%	
The Hodell Chain Co.		30-5%	
International Chain & Mfg. Co.		30-5%	
The McKay Co.		30-5%	
Nixdorff-Krein Mfg. Co.		30-5%	
Pyrene Manufacturing Co.		30-5%	
Round California Chain Corp., Ltd.		30-5%	
St. Pierre Chain Corp.		30-5%	
Seattle Chain & Mfg. Co.		30-5%	
S. G. Taylor Chain Co.		30-5%	
Woodhouse Chain Works		30-5%	
Ten or More Pairs			
American Chain & Cable Co., Inc.		30-5-5%	
The Bridgeport Chain & Mfg. Co.		30-5-5%	
The Cleveland Chain & Mfg. Co.		30-5-5%	
Columbus-McKinnon Chain Corp.		30-10%	
The Hodell Chain Co.		30-5-5%	
International Chain & Mfg. Co.		30-5-5%	
The McKay Co.		30-5-5%	
Nixdorff-Krein Mfg. Co.		30-10%	
Pyrene Manufacturing Co.		30-5-5%	
Round California Chain Corp., Ltd.		30-5-5%	
St. Pierre Chain Corp.		30-5-5%	
Seattle Chain & Mfg. Co.		30-5-5%	
S. G. Taylor Chain Co.		30-5-5%	
Woodhouse Chain Works		30-5-5%	

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Private Brands Standard Specifications		
American Chain & Cable Co., Inc.	50-7-10%	50-7%
Pyrene Manufacturing Co.	50-7-10%	50-7%
Columbus-McKinnon Chain Corp.	50-7-10%	50-7%

Sub-standard Specifications Factory or Private Brands		
American Chain & Cable Co., Inc.	50-7-10%	50-7%
Pyrene Manufacturing Co.	50-7-10%	50-7%
Columbus-McKinnon Chain Corp.	50-7-10%	50-7%

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Factory Shipment 50 or More Vehicles	Jobber	Fleets, Taxis and Common Carriers Including National Tire and Oil Companies' Own Use	National Industrial Consumers, Fleet Owners, Taxi Companies, Bus Lines and Other Common Passenger Carriers
American Chain & Cable Co., Inc.		40-10%	
Columbus-McKinnon Chain Corp.		40-10%	
The Hodell Chain Co.			40-10%
The McKay Co.		[1] 40-10%	
Pyrene Manufacturing Co.		40-10%	
St. Pierre Chain Corp.			40-10%

Jobbers' Stock Shipments 50 or More Vehicles			
American Chain & Cable Co., Inc.		40%	
Columbus-McKinnon Chain Corp.		40%	
The Hodell Chain Co.			40%
906 The McKay Co.		[1] 40%	
Pyrene Manufacturing Co.		40%	
St. Pierre Chain Corp.			40%

[1] Description does not include "National Tire and Oil Companies' Own Use".

Less than 50 Vehicles	
The Hodell Chain Co.	30-10%
St. Pierre Chain Corp.	30-5-5%

Appendix "A".

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Sub-standard Specifications	
American Chain & Cable Co., Inc.	50-7%
Pyrene Manufacturing Co.	50-7%
Columbus-McKinnon Chain Corp.	50-7%

Effective Dates, and Exhibit References for Comparative Summary of Discounts Allowed by 15 Manufacturers on Tire Chains Sold to Each Class of Customers in the Various Channels of Distribution

	Effective Date	Exhibit Reference (C = Commission)
American Chain & Cable Co., Inc.	May 1, 1941	C-1210-A
The Bridgeport Chain & Mfg. Co.	June 10, 1941	C-1438-C
The Cleveland Chain & Mfg. Co.	June 10, 1941	C-738-A
Columbus-McKinnon Chain Corp.	June 5, 1941	C-1307-A
The Hodell Chain Co.	June 25, 1941	C-645-A and C-645-W
International Chain & Mfg. Co.	June 15, 1941	C-603
The McKay Co.	June 2 and 6, 1941	C-1370
Nixdorff-Krein Mfg. Co.	June 15, 1941	C-1396-C
Pyrene Manufacturing Co.	June 2, 1941	C-1368-A
Round California Chain Corp., Ltd.	June 10, 1941	C-1360-A-B
St. Pierre Chain Corp.	May 1, 1941	C-554-A—Season 1941-42
Seattle Chain & Mfg. Co.	June 10, 1941	C-1406-A
S. G. Taylor Chain Co.	June 27, 1941	C-661-A, C-661-I and C-661-Q
Western Chain Products Co.	June 1, 1941	C-1136-C
Woodhouse Chain Works	July 1, 1941	C-1190-C

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Filed May 18, 1948.

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RESPONDENTS' PROPOSED FINDINGS OF FACT, CONCLUSIONS AND ORDER

Foreword

The following proposed findings of fact adhere in broad outline to the subject matter arrangement of the amended complaint. However, no attempt has been made to follow slavishly the detailed paragraph and subparagraph structure of the amended complaint, for the reason that to do so would result in unnecessary repetition and possible confusion.

To assure the Trial Examiner that the proposed findings have not failed to deal with every material charge in the
911 amended complaint, there is submitted below a cross reference table showing where, in the proposed findings, the subject matter of each paragraph and subparagraph of the amended complaint (except purely formal preambles, etc.) can be found.

It is believed that this cross reference table, plus the detailed treatment of facts in our main memorandum under each paragraph and subparagraph of the complaint, will enable the Examiner to make a detailed analysis of the facts and proposed findings in the light of the complaint.

912

CROSS REFERENCE TABLE

Paragraph of Amended Complaint	*Paragraph of Proposed Findings of Fact*
	COUNT I
ONE	Not Covered
TWO	Not Covered
THREE	ONE
FOUR	TWO
FIVE (1)	THREE
FIVE (2)	THREE (a)
FIVE (3)	THREE (b)
FIVE (4)	THREE (d) (h) 914
FIVE (5)	THREE
FIVE (6)	THREE (g), SIX, SEVEN & EIGHT
FIVE (7)	THREE (g), SIX, SEVEN & EIGHT
FIVE (8) (a)	SIX
FIVE (8) (b)	THREE (a) (b) (d)
FIVE (9)	THREE (c)
FIVE (10)	THREE (a) (b) (d)
FIVE (11)	THREE (a) (b)
FIVE (12)	THREE (a) (b) (h)
FIVE (13)	THREE (a) (b) (d)
FIVE (14)	THREE (d) (h)
FIVE (15)	THREE (e)
FIVE (16)	THREE (f)
FIVE (17)	FIVE
FIVE (18)	THREE
SIX	FOUR
SEVEN	FIVE 915
EIGHT	SIX, SEVEN, EIGHT
NINE	SIX
TEN	SEVEN
ELEVEN	EIGHT
TWELVE	Not Covered
THIRTEEN	NINE, TEN, ELEVEN

Paragraph of Amended Complaint	*Paragraph of Proposed Findings of Fact*
	COUNT II
ONE	Not Covered
TWO	Not Covered
THREE	ONE
FOUR	TWO
FIVE	EIGHT
SIX	THREE, FOUR
SEVEN	THREE, FOUR
EIGHT	SIX
NINE	THREE, FOUR
917 TEN (1)	THREE, FOUR
TEN (2)	THREE, FOUR
TEN (3)	THREE, FOUR
TEN (4)	Not Covered
TEN (5)	THREE, FOUR
TEN (6)	THREE, FOUR
ELEVEN	SEVEN
TWELVE	EIGHT

PROPOSED FINDINGS AND CONCLUSIONS

COUNT I

PARAGRAPH ONE: *Description of Respondents.* (1) Respondent Chain Institute, Inc., a trade association (sometimes hereinafter referred to as Institute), is a cor-
918 poration organized and existing under the laws of the State of Delaware, with its principal office at 208 S. LaSalle Street, Chicago, Illinois. Respondent Institute was first organized in June, 1933 (R. 599). The Sash and Kindred Chain Group has been operated as a separate and distinct division of the Chain Institute, holding meetings separately from the Institute generally or any other division of the Institute; companies which are members of this Group only do not receive notices of meetings of the Institute or copies of minutes of meetings of the Institute (R. 2251-2).

(2) Respondent American Chain & Cable Company, Inc. (sometimes hereinafter referred to as American), is a corporation organized and existing under the laws of the State of New York, with its principal office at Bridgeport, Connecticut. Its general office is at 230 Park Avenue, New York, N. Y. It has a plant located at East Princess and Charles Streets, York, Pennsylvania, where during the period covered by the amended complaint, it manufactured and sold welded, weldless and tire chain, and a plant at Braddock, Pennsylvania, where, during the period covered by the amended complaint, it manufactured and sold welded chain. Respondent American joined the Chain Institute in June, 1933, and has continuously since that time been, and now is, a member of the said Institute (R. 599, 1281, 1476-7). 920

(3) The respondent Bridgeport Chain & Manufacturing Company (sometimes hereinafter referred to as Bridgeport) is a Connecticut corporation with its principal office at 964 Crescent Avenue, Bridgeport, Connecticut, and plant at the same location, where, during the period covered by the amended complaint, it manufactured and sold weldless chain and sold welded and tire chain (R. 599-600).

(4) Respondent The McKay Company (sometimes hereinafter referred to as McKay) is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal offices located at McKay Building, Pittsburgh, Pennsylvania. McKay has a plant at York, Pennsylvania, where, during the period covered by the amended complaint, it manufactured and sold welded, weldless and tire chain, and a plant at McKees Rocks, Pennsylvania, where, during the period covered by the amended complaint, it manufactured and sold welded chain. Respondent McKay joined the Chain Institute in June, 1933, and has 921

continuously since that time been, and now is, a member of the said Institute (R. 600, 977-80).

(5) Respondent Pyrene Manufacturing Company (sometimes hereinafter referred to as Pyrene) is a corporation organized and existing under the laws of the State of Delaware, with its principal office located at 560 Blmnt. Avenue, Newark New Jersey, and plant at Empire Street, Newark, New Jersey, where, during the period covered by the amended complaint it manufactured and sold tire chain. Respondent Pyrene joined the Chain Institute in June, 1933, and has continuously since that time been, and now is, a member of the said Institute (R. 600).*

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(6) Respondent Hodell Chain Company (sometimes hereinafter referred to as Hodell) is a corporation organized and existing under the laws of the State of Ohio. Said respondent was organized in 1896 and until recently traded under the name and title Chain Products Company. Prior to using this name this Company was known as the Cleveland Galvanizing Company (R. 1001). Respondent has a plant at Cleveland, Ohio, where during the period covered by the amended complaint, it manufactured and sold welded, weldless and tire chain. Respondent Hodell joined the Chain Institute in 1935, but resigned therefrom in 1939 (R. 600-1).

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(7) Respondent St. Pierre Chain Corporation (sometimes hereinafter referred to as St. Pierre) is a corporation organized and existing under the laws of the State of Massachusetts, with its principal office located in Worcester, Massachusetts, and plant at the same location, where

* By letter dated April 30, 1948 to the Secretary of the Commission, Pyrene announced the sale of its tire chain business to The Newark Chain Company, not a respondent in this proceeding.

during the period covered by the amended complaint, it manufactured and sold tire chain. Recently it has manufactured and sold the type of welded chain known as stud link anchor chain (R. 1525); it does not manufacture or sell any weldless chain (R. 1533). Respondent St. Pierre joined the Chain Institute in June, 1933, and has continuously since that time been, and now is, a member of the said Institute (R. 601).

(8) Respondent S. G. Taylor Chain Company (sometimes hereinafter referred to as Taylor) is a corporation organized and existing under the laws of the State of Illinois, with principal office located at 3-141st Street, Hammond, Indiana, and plant at Hammond, Indiana, where during the period covered by the amended complaint, it manufactured welded and tire chain and sold welded, weldless and tire chain. Respondent Taylor joined the Chain Institute in June, 1933, and has continuously since that time been, and now is, a member of the said Institute (R. 601). 926

(9) Respondent Cleveland Chain & Manufacturing Company (sometimes hereinafter referred to as Cleveland) is a corporation organized and existing under the laws of the State of Ohio with principal office located at Broadway and Henry Streets, Garfield Heights, Cleveland, Ohio, and plant at the same location, where, during the period covered by the amended complaint, it manufactured and sold welded, weldless and tire chain. Respondent Cleveland joined the Chain Institute in June, 1933, and has continuously since that time been, and now is, a member of the said Institute (R. 601-2). 927

(10) Respondent Columbus McKinnon Chain Corporation (sometimes hereinafter referred to as Columbus

McKinnon) is a corporation organized and existing under the laws of the State of New York, with principal office located at Tonawanda, New York, and plant at the same location, where, during the period covered by the amended complaint, it manufactured welded and tire chain and sold welded, weldless and tire chain. Respondent Columbus McKinnon joined the Chain Institute in June, 1933, and has continuously since that time been, and now is, a member of the said Institute (R. 602, 928).

(11) Respondent International Chain & Manufacturing
929 Company (sometimes hereinafter referred to as International) is a corporation organized and existing under the laws of the State of Pennsylvania, with principal office located at Norway and Elm, York, Pennsylvania, and plant at the same location, where, during the period covered by the amended complaint, it manufactured and sold welded, weldless and tire chain. Respondent International joined the Chain Institute in June, 1933, resigned therefrom on June 17, 1939, rejoined on June 15, 1940, and has continuously since the latter date been, and now is, a member of the said Institute (R. 602-3).

(12) Respondent Nixdorff-Krein Manufacturing Company (sometimes hereinafter referred to as Nixdorff-Krein) is a corporation organized and existing under the
930 laws of the State of Delaware, with principal office located at 900 Howard Street, St. Louis, Missouri, and plant at St. Louis, Missouri, where, during the period covered by the amended complaint, it manufactured and sold welded and tire chain and sold weldless chain. Respondent Nixdorff-Krein joined the Chain Institute in June, 1933, and has continuously since that time been, and now is, a member of the said Institute (R. 603).

(13) Respondent Peerless Chain Company (sometimes hereinafter referred to as Peerless) is a corporation organized and existing under the laws of the State of Minnesota, with its principal office located at Winona, Minnesota, and plant at the same location, where, during the period covered by the amended complaint, it manufactured welded and tire chain, and sold welded, weldless and tire chain. Peerless began to manufacture weldless chain in 1941 and has a very small capacity (R. 1934-5). Peerless joined the Chain Institute in July, 1933, and has continuously since that time been, and now is, a member of the said Institute (R. 603).

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(14) Respondent Round California Chain Company (sometimes hereinafter referred to as Round California) is a corporation organized and existing under the laws of the State of California, with its principal office located on Bay Shore Highway, South San Francisco, California, and plant at the same location, where, during the period covered by the amended complaint, it manufactured and sold welded chain and sold weldless and tire chain (R. 603-4).

(15) Respondent J. M. Russell Manufacturing Company (sometimes hereinafter referred to as Russell) is a corporation organized and existing under the laws of the State of Connecticut with its principal office located at Naugatuck, Connecticut, and plant at the same location, 933
where during the period covered by the amended complaint, it manufactured and sold only a few types of the kind of weldless chain known as sash and kindred chain. Respondent Russell joined the Sash and Kindred Chain Group of the Chain Institute in July, 1933, and has continuously since that time been, and now is, a member of the said Group (R. 604, 2244).

(16) Respondent Seattle Chain & Mfg. Company (sometimes hereinafter referred to as Seattle) is a corporation organized and existing under the laws of the State of Washington, with principal office at 6921 East Marginal Way, Seattle, Washington, and plant at the same location, where, during the period covered by the amended complaint, it manufactured and sold welded chain and sold weldless and tire chain (R. 604).

(17) Respondent Turner & Seymour Manufacturing Company (sometimes hereinafter referred to as Turner & Seymour) is a corporation organized and existing under
935 the laws of the State of Connecticut with principal office at Torrington, Connecticut, and plant at the same location, where, during the period covered by the amended complaint, it manufactured and sold only the type of weldless chain known as sash and kindred chain. Respondent Turner & Seymour joined the Sash and Kindred Chain Group of the Chain Institute in July, 1933, and has continuously since that time been, and now is, a member of the said Group (R. 604-5, 2260-1).

(18) Respondent Western Chain Products Company (sometimes hereinafter referred to as Western) is a corporation organized and existing under the laws of the State of Illinois, with its principal office located at 1807 West
936 Belmont Avenue, Chicago, Illinois, and plant at the same location, where, during the period covered by the amended complaint, it manufactured welded and tire chain and sold welded, weldless and tire chain. It began to manufacture weldless chain in 1945 (R. 2135). Respondent Western joined the Chain Institute in July, 1933, and has continuously since that time been, and now is, a member of the said Institute (R. 605).

(19) Respondent Woodhouse Chain Works (sometimes hereinafter referred to as Woodhouse) is a corporation organized and existing under the laws of the State of New Jersey, with principal office at 251 Third Street, Trenton, New Jersey, and plant at the same location, where, during the period covered by the amended complaint, it manufactured and sold welded chain and sold weldless and tire chain. Respondent Woodhouse joined the Chain Institute in June, 1933, and has continuously since that time been, and now is, a member of the said Institute. Respondent Woodhouse was purchased by respondent Cleveland in 1947 (R. 605-6, 1670).

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(20) Respondent Dennis A. Merriman, an individual (sometimes hereinafter referred to as Merriman) has been Managing Director of Respondent Institute with office located at 208 South LaSalle Street, Chicago, Illinois, since August 1, 1938 (R. 606, 612).

(21) Respondent Walter S. McCann, an individual (sometimes hereinafter referred to as McCann) was Secretary & Treasurer of Respondent Institute, during part of the period covered by the amended complaint, with office located at 208 South LaSalle Street, Chicago, Illinois. McCann died on May 19, 1945 (R. 606).

(22) Respondent Wm. D. Kirkpatrick, an individual 939
(sometimes hereinafter referred to as Kirkpatrick) is Vice President of respondent American, and from November, 1942, to November, 1944, was president of Respondent Institute. His office is located at the office of Respondent American at York, Pennsylvania. Since June, 1938, he has represented respondent American in its membership in respondent Institute and as such representative of respondent American has attended meetings of representa-

tives of other members, and in that capacity has served on committees of Respondent Institute and has written and otherwise communicated with other representatives of members of Respondent Institute concerning action of the Institute, its officials and members (R. 606-7).

(23) Respondent Frank A. Bond, an individual (sometimes hereinafter referred to as Bond) is Executive Vice President and Secretary of respondent McKay, with office located at McKay Building, Pittsburgh, Pennsylvania. Since 1933 he has represented respondent McKay in its membership in respondent Institute and as such repre-
941 sentative of McKay has attended meetings of representatives of other members, and in that capacity has served on committees of respondent Institute, and has written and otherwise communicated with other representatives of members of respondent Institute concerning action of the Institute, its officials and members. He served from June, 1933 to date as Chairman of the Traffic Committee of the Chain Institute in dealing with freight rate matters (R. 607).

(24) Respondent George J. Campbell, Jr., an individual (sometimes hereinafter referred to as Campbell) has been President of respondent International since September, 1941, with offices located at the principal place of business
942 of respondent International in York, Pennsylvania. From November, 1942, to November, 1944, he served as vice-president of respondent Institute. Since September, 1941, he has represented respondent International in its membership in respondent Institute and as such representative of respondent International has attended meetings of representatives of other members, and in that capacity has served on committees of respondent Institute, and has written and otherwise communicated with other representa-

tives of members of respondent Institute concerning action of the Institute, its officials and members. George J. Campbell, Sr., was president of respondent International from 1922 to September 9, 1941, when he died. From June 19, 1933 to June 17, 1939, and from June 15, 1940 to September 9, 1941, he represented respondent International in its membership in respondent Institute and as such representative of respondent International attended meetings of representatives of other members, and in that capacity served on committees of respondent Institute, and wrote and otherwise communicated with other representatives of members of respondent Institute concerning action of 944
the Institute, its officials and members (R. 607-8).

(25) Respondent Alfred Peter Shirley (sometimes hereinafter referred to as Shirley) is an individual, a resident of Punto Gordo, Florida, who is an engineer and manufacturers' sales representative and is a partner in the firm of Shirley, Olcott & Nichols, which maintains its offices in the Mills Building, Washington, D. C. (R. 608).

(26) Respondent Floyd B. Olcott (sometimes hereinafter referred to as Olcott) is an individual who resides at 7828 Orchid Street, N.W., Washington, D. C., who is an engineer and manufacturers' sales representative and is a partner in the firm of Shirley, Olcott & Nichols, which maintains its offices in the Mills Building, Washington, D. C. (R. 945
608).

(27) Respondent Forrest G. Nichols (sometimes hereinafter referred to as Nichols) is an individual who resides at 4702 Quebec Place, Washington, D. C., and who is an engineer and manufacturers' sales representative and is a partner in the firm of Shirley, Olcott and Nichols, which maintains its offices in the Mills Building, Washington, D. C. (R. 609).

(28) Respondents Cleveland, Seattle, Round California and Bridgeport are affiliated through common ownership of the controlling capital stock of each of said respective corporations. L. D. Cull is Chairman of the board of directors of each of said four corporations. Through his representation of respondent Cleveland in its membership in respondent Institute, he also represented respondents Seattle, Round California and Bridgeport, and their interests, at meetings of members of the respondent Institute and in other activities of the Institute (R. 609). Each of these affiliated companies (now also including respondent
947 Woodhouse) merchandised each others' products and there were actual transactions of purchase and sale between them, i.e., one affiliate would buy a certain quantity of a particular chain item from another affiliated company and pay the first company for such chain and then resell the chain as if it had manufactured it itself (R. 1677).

(29) Each of the respondents described in sub-paragraphs (2) to (19), inclusive, of this paragraph is now, and was during the period covered by the amended complaint, engaged in the manufacture and sale of chain and chain parts (R. 609).

PARAGRAPH TWO: *Description of Chain Industry and Interstate Commerce.* Respondent Manufacturers produce
948 various types of steel, alloy-steel and other metallic chain and chain parts. The principal types of chain involved are welded chain, weldless chain, sash and kindred chain and tire chain (R. 609).

Welded chain is so designated because each link is closed and sealed through welding. It includes chain of various size and weights for many uses such as anchor chains, log chains, tie chains (for securing dairy cows at stanchions),

tie-out chains (for use in securing cows and other animals for grazing, etc.) and trace chains (for harnessing teams and for other agricultural uses). Since the development of the art of electric welding, the welded chain industry has used it for mass production of welded chain, although the earlier fire welding method is still used for the larger sizes. In the trade, most welded chain is also referred to as commercial chain and pound chain. Such welded chain is priced by the manufacturers on a per pound basis (R. 610).

Weldless chain is for the most part light in weight and in general is used where the stronger chain is not required. 950
Weldless chain is classified by the trade into two principal types: (1) Ordinary weldless chain, which is made by bending wire into the form of links and twisting or tying rather than welding it; this type of weldless chain is used as cow ties, porch swing chain, well chain, dog leads, animal trap chains, and for many other purposes: (2) Sash and kindred chain, which is made by stamping or cutting the links from flat metal strip stock; this type of weldless chain is used as window sash chains, transom chains, furnace chain, ships' telegraph chain, and for many other purposes (R. 610). For a number of years sash and kindred chain was manufactured by companies which did not make any other types of chain and the history and selling practices indicate that this is a separate branch of the chain industry (R. 1258, 2244-5, 2261, 2263). 951

Tire chains are made by the welding process but are so linked as to form two line chains connected by cross chains at equal distances so that they may be attached around the wheels of motorized equipment, including automobiles, trucks and farm tractors (R. 610-11). In the early days side chains were weldless and cross chains welded, but now side chains are welded also (R. 976). Tire chain is sold to

an entirely different class of customers than either welded or weldless chain (R. 1057-8).

Each of the foregoing types of chain had its own separate history of manufacturing and marketing development as hereinafter more fully set forth and to that extent constituted a wholly separate industry.

Respondent manufacturers in the course and conduct of their business manufacture, sell and distribute approximately 85 per cent (R. 1882) of the welded chain, weldless chain, sash and kindred chain and tire chain produced in the United States. The said respondent manufacturers
953 sell such products at various points throughout the United States to wholesalers, dealers and consumers including the United States Government, and when sales are made, respondent manufacturers have regularly shipped and do ship said products to the purchasers at points in the several states of the United States and the District of Columbia other than in the States of origin of the shipments. They are engaged in commerce in selling and shipping said products, within the meaning of the term "commerce" as defined in the Federal Trade Commission Act and the Clayton Act (R. 611).

PARAGRAPH THREE (a) *The Chain Institute.* Respondent Chain Institute, Inc., was organized in June, 1933,
954 by respondent manufacturers American, McKay, Pyrene, St. Pierre, Taylor, Cleveland, Columbus McKinnon, International, Nixdorff-Krein and Woodhouse (R. 611). The members of the Institute have operated, and now operate, the Institute as an incorporated trade association to carry on in general the usual functions of a trade association. The Institute has carried on a number of activities which promote the mutual interests of the respondent members, including exchange of general information on market

conditions (R. 1156, 1317, 2281), exchange of information on labor relations (R. 1156, 2281), cooperative advertising (R. 1317, 2250, 2281), attempting to secure a tariff on chain products in order to meet foreign competition (R. 2250; Com. Ex. 229), standardization of welded chain in cooperation with the U. S. Bureau of Standards (R. 1140-1, 1426-8; Res. Ex. 7), and other activities described in more detail below.

The Institute has carried on a statistical program under which each member reports to the Institute the amount of chain shipped each month. From these reports the Institute computes total shipments of the various types of chain 956
by industry members. Reports are then sent back to each member showing the total amount of chain shipped by the industry for the month in question and the percentage of that total which the particular member has shipped (Res. Ex. 53, 53A, 53B at R. 2424-7). The figures reported by the various companies are kept confidential and no company receives any information as to the shipments by any individual competitor (R. 1406, 1741, 2065).

The Institute has carried on a tire chain specifications program which has been beneficial to the tire chain manufacturers, to Federal, state and local government agencies and to the using public generally. The standardization in the lengths of side chains and cross chains resulting from the existence of these specifications has produced an in- 957
terchangeability which has benefited users through permitting them to obtain replacement cross chains from any manufacturer (R. 1424, 1463, 1549, 2023), and has reduced the cost of production of tire chain (R. 1549, 2022). The Institute tire chain specifications are copyrighted and thus available to the public through the Library of Congress (R. 1143). The effect of the promulgation of these tire chain specifications by the Institute has been to increase competition in the sale of tire chain (R. 1425, 1549, 2021).

In 1933, the Institute employed Charles Donley, an independent traffic consultant in Pittsburgh, Pa., to compile a book of freight rates on welded chain from Pittsburgh, Pa., to destinations throughout the United States and to revise this compilation from time to time (R. 612). This so-called Donley freight rate book is described in more detail in Paragraph Six below. It has no relation to the sale of weldless or tire chain.

On the occasion of meetings of the Institute (other than meetings of the Sash and Kindred Chain Group)* some of the respondent manufacturers sometimes discussed the
959 prices charged by individual respondent manufacturers on particular past and closed transactions. The general nature of such discussions was that one respondent manufacturer would ask another whether there was any truth to a report which the first manufacturer had heard through a salesman that the second manufacturer had granted an extra or off-list discount on a particular sale to a particular customer, and the second manufacturer might admit or deny the giving of such extra discount or might refuse or evade an answer (R. 1099-1103, 1199, 1317-22, 1327, 1469, 1606-7, 1646, 1748-50, 2010, 2106-7). The principal purpose of such conversations was to check on the accuracy of statements made by buyers, as certain buyers were continuously attempting to obtain additional discounts by un-
960 truthfully stating that a competitor had granted an additional discount (R. 1373, 1978, 2107). After the enactment of the Robinson-Patman Act, respondent manufacturers felt it even more necessary to check on the accuracy of such representations by buyers to guide the manufacturer in determining whether to sell at lower than its published price in order to meet competition in accordance with the limitations of the Robinson-Patman Act (R. 1319, 1337).

* See separate memorandum of Marsh, Day & Calhoun, Esqs.

All conversations of this nature ceased by late 1940 or early 1941 (R. 1101). Respondent manufacturers did not intend any such conversations to lead to any agreements or understandings with respect to future action (R. 1103, 1320-1, 1978-9). As a matter of fact, these conversations did not have any effect on continued price cutting (R. 1101-3, 1318, 1320-1, 1607). Respondent manufacturers had been advised by counsel that it was not unlawful to discuss these "past transactions" (R. 1748, 2083), this advice being based upon such Supreme Court decisions as that in the Maple Flooring case (R. 1748). No information concerning current or future prices was discussed at meetings of the Institute or exchanged by respondent manufacturers through 962
the Institute in any way (R. 1109-10, 1332, 1335, 1366-7, 2249, 2252). The Institute did not disseminate or distribute price lists among its members after the N.R.A. period (R. 1100, 1754, 2020, 2068).

(b) *Dennis A. Merriman.* Respondent Merriman was employed as Managing Director of the Chain Institute on or about August 31, 1938, and has served in that capacity from that time to the present (R. 612). He was employed to fulfill only the normal functions of the operating executive of a trade association, following the death of Irving S. Paull, his predecessor (R. 2089-90). His most important function has been to act in a public relations capacity in promoting the sale of chain generally (R. 2057-61). Other major duties which he performs or has performed include 963
studying trade publications and other indicators of general business conditions and passing on pertinent information to the members of the Institute (R. 1158-9, 2063-5), making arrangements for meetings of the Institute (R. 1158, 2061), preparing the agenda for meetings (R. 1158), seeing that committee activities were carried on and reports issued without undue delay (R. 1244, 2062), acting as liaison between the chain industry and the Government during the

war in connection with war production (R. 1590), and supervising the office staff of the Institute (R. 1158).

Respondent Merriman has had no function, control or authority whatsoever in connection with the prices of chain and chain products and has never attempted to exercise any such functions, control or authority (R. 1144, 1342, 1552, 1587, 1623-4, 1646, 1765-6, 2017, 2071-2, 2166-7). Although Merriman was occasionally referred to as a "Judge Landis", this appellation was applied merely facetiously (R. 1227, 1779).

965 On infrequent occasions respondent Merriman has made telephone inquiries of various respondent manufacturers as to prices charged by them on particular past transactions (R. 1115-7). The general nature of such telephone conversations was that Merriman would call a particular manufacturer and say that he had been told that the manufacturer had charged a certain price on a sale of a certain item of chain to a certain customer, and ask the manufacturer whether that was true. The manufacturer might admit or deny having made the transaction described or might refuse or evade an answer. Merriman would accept whatever reply was given him without revealing the name of the person who had asked him to make the inquiry and without making any request of the manufacturer called with respect to any future action (R. 1225, 1764-5, 2076). Merriman was not
966 employed for the purpose of making such telephone inquiries (R. 2072-3), and no one regarded it as a regular part of his job (R. 1226, 2075, 2077). No such calls were ever made to certain respondent manufacturers (R. 1591, 2190). At no time did Merriman request any one to take any action on the basis of such an inquiry (R. 1116, 1225, 2076). The purpose of these telephone inquiries was to ascertain whether customers were misrepresenting to salesmen the extent of discounts granted by other chain com-

panies (R. 1943, 1978, 2076). No such telephone calls have been made since 1941 (R. 2103).

During respondent Merriman's long years of business experience which culminated in his becoming vice president and general manager of sales of a large steel fabricating company (R. 2049), from which position he had been retired just prior to accepting the position of Managing Director of the Chain Institute, he had developed a strong personal philosophy with reference to selling in accordance with published prices which he stated (R. 2084) as follows:

> "My philosophy is that if a member discovers or ascertains that his prices in effect as published are not being maintained, that as soon as he so discovers, he should publish a new price list, and not have a published price list in effect that did not represent what he was getting for his material." 968

Merriman made occasional speeches at meetings of the Institute in the course of which he stated this philosophy (R. 1471, Com. Ex. 212). The members regarded these speeches as nothing more than an expounding of his personal philosophy and not as any "suggestion" as to future price action on the part of respondent manufacturers (R. 1878-9, 2167). Beyond this bare expression of his personal views, Merriman at no time advocated adherence to published prices (R. 2084-5). These speeches by Merriman did not have any effect on price cutting by respondent manufacturers and such price cutting was very vigorous during and after this very period when Merriman was expressing his view (R. 1630, 1712, 1938). 969

(c) *Price Leadership.* Respondent American has for more than 25 years been the most important factor in the chain industry in this country. It was one of the first respondent manufacturers to enter the field and is the larg-

est manufacturer of most of the types of chain described herein. It has maintained its position through a vigorous research program both as to new products and as to improving the quality of its products, extensive advertising, and rigorous attempts at efficient and economical operation combined with a detailed cost accounting system and a policy of keeping its prices consistent with its costs (R. 613, 1332-6).

American has generally been a leader in publishing prices on the types of chain and chain products described herein. Other respondent manufacturers have generally
971 adopted and published as their own prices identical with those published by American and have followed such quotations of American for substantial periods of time in connection with interstate sales and shipments of chain and chain products. Although during such periods of time they did publish prices (including the base price and other price factors, including basic and other discounts, and the various terms of sale) identical with those made by American, at other times there has been substantial variation in such published prices (R. 613).

When American has published a new price list or discount sheet and distributed it to its jobber customers, it has also contemporaneously distributed it to the other respondent manufacturers for the reason that all the other
972 respondent manufacturers were customers of American and purchased chain of various types from it at one time or another (R. 1110-5, 1334-5, 1446). Although the general practice of American was to mail these new price lists or discount sheets to the other respondent manufacturers at the same time that they were mailed to American's jobber customers, on some occasions some of the other respondent manufacturers have received these new published prices or discounts from friendly jobbers before receiving them from

973

American (R. 1110, 1750). Within a few days after learning of a price change by American the other respondent manufacturers normally made the same change in their published prices (R. 1896), and after a period of from two to six weeks issued revised price lists or discount sheets of their own (R. 1895-6). American has never informed its competitors of price changes it was going to make, prior to distributing these new published sheets (R. 1109-10, 1332, 1335).

On some occasions a price change has been initiated by a respondent manufacturer other than American (R. 2273). Except possibly with respect to sash and kindred chain, no other manufacturer can sell at a price higher than that published by American (R. 1148, 1583, 1750-1, 2249), and American's prices were at no time higher than justified by cost considerations (R. 1336, 1750, 1869, 2272) and were sometimes lower than justified by costs (R. 1328-30). The price lists in evidence show considerable variation in published prices between Turner & Seymour and American.

974

The recognition of respondent American as a price leader by the other respondents has been as a result of American's natural economic position in the chain industry and not as a result of any agreement or understanding.

(d) *Uniformity of Published Prices.* The respondent manufacturers' published prices and published discounts (except the published discounts of Russell and Turner & Seymour have been generally uniform at any one particular time (R. 872-5). These published prices have not remained static for any long period of time, however, but have changed frequently during the period covered by the evidence in this proceeding (Com. Ex. 464-875, 968-1210, 1268-1313, 1355-1567, 1580-1622).

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This uniformity of published prices has resulted from the fact that all types of chain are homogeneous articles. With respect to welded chain, weldless chain and sash and kindred chain it is not possible to distinguish between the product of one manufacturer and the product of another manufacturer, once the chain has been removed from its container (R. 1159, 2144, 2276). No buyer will pay more for welded, weldless or sash and kindred chain made by one manufacturer than for that made by another (R. 1034, 1035, 2144). Buyers of this type of chain are well informed as to the prices of all manufacturers (R. 1160).
977 With respect to tire chains the situation is different only to the extent that extensive advertising by some manufacturers (R. 1036, 1289-91) has created consumer preference for their brands and has enabled them to publish higher prices than the manufacturers of non-advertised brands (R. 1036, 2153), although one unpatented tire chain is about as good as another (R. 1302).

This situation has caused the respondent manufacturers to publish uniform list prices and then to make sales at off-list prices (extra discounts). Even in so-called "normal" times, approximately 20% of the respondent manufacturers' total sales have been at off-list prices (R. 875-6) and in depressed business periods such as 1932, the early part of 1933 and 1936 and 1938, the percentage of off-list
978 sales has been considerably higher (R. 876) and there were frequent price wars (R. 1058-60). This continual price cutting occurred with respect to all four types of chain, welded chain (R. 1035), weldless chain (R. 1036), sash and kindred chain (R. 2245-6, 2266-8), and tire chain (R. 1037, 1303, 1606-13).

There has been some uniformity of prices bid by some of the respondent manufacturers on government contracts, including Navy contracts for welded and weldless chain

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and Treasury Department contracts for tire chain. However, there were many variations of respondents' bids (Com. Ex. 947-967). Bids to the Treasury Department on contracts for tire chain (Com. Ex. 888-940) show a greater degree of uniformity than the bids on Navy contracts but not complete uniformity. Most of the respondent manufacturers of tire chains bid their regular published prices for the reason that they did not particularly want these contracts because of the indefinite quantity provisions (R. 1832, 1986, 2172-3), but continued to bid because they wanted their names to remain on the Treasury Department list to receive invitations to bids on all types of chain contracts (R. 1985, 2173).

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Some of the respondent manufacturers mailed their published price lists and discount sheets to their competitors at the time they mailed the same to their jobber customers. They did this because at one time or another almost every manufacturer purchased some types of chain from other chain manufacturers in order to fill orders for sizes or types of chain which it did not produce at all or to fill small orders for sizes which it was not economical for the particular manufacturer in question to produce in time to fill the particular order, since a chain manufacturer must fill all orders it receives or lose customers for items it does produce (R. 1110-5, 1134-5, 1446-7, 1575, 1753, 2249, 2273-4, 2281).

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Such uniformity of published prices and of bids on government contracts as existed has not been caused by any agreement, understanding or combination among the respondent manufacturers (R. 1108, 1330, 1332, 1335, 1364-7, 1588-9, 2248, 2251-2, 2255, 2271-2). There has not been any communication among the respondents concerning any future prices (R. 1109-10, 1332, 1335, 1367, 1812).

(e) *Resale Prices.* So-called "jobbers' sales agreements" and "dealers' agreements" have been entered into between some tire chain manufacturers and their distributors. Some of these agreements have contained "suggested resale prices." These resale prices were merely suggested by the manufacturers in question, and there was no obligation on the part of the jobber or dealer to follow any such suggested prices (R. 1127, 1841, 2189).

These jobbers' sales agreements and dealers' agreements pertained only to tire chain. There have been no such agreements pertaining to welded chain, weldless chain or
983 sash and kindred chain, and no resale prices have been suggested for any of these types of chains.

(f) *Channels of Distribution.* During the N.R.A. period, respondent manufacturers of tire chain published a schedule showing their respective discount structures for tire chains, as a mechanism to assure compliance with the Code requirement of selling at filed prices (R. 1128-9), the name "channels of distribution" being adopted merely to make these schedules sound important (R. 1754). There has never been any discussion or agreement among the respondents as to whether a particular customer should be classified as a jobber, semi-jobber, dealer or consumer, each manufacturer deciding that independently for himself in dealing with his customers (R. 1340, 1755). Neither re-
984 spondent Merriman nor respondent Institute or its officers, directors or agents, nor respondents Shirley, Olcott or Nichols had anything to do with respondents' channels of distribution, or with classifications of purchasers (R. 2091-2).

(g) *Delivered Price Methods of Selling.* Welded chain is sold under the so-called "Pittsburgh Plus" method (R. 620) which is described in Paragraph Six below. Weld-

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less chain (including sash and kindred chain) is sold under the "freight equalization" method (R. 621) described in Paragraph SEVEN below. Tire chain is sold under the "universal delivered price" method (R. 622) which is discussed in Paragraph EIGHT below.

The "Pittsburgh Plus" method of selling welded chain was first adopted before any of the respondents in this proceeding entered the industry (R. 620), by companies which made only welded chain and did not make or sell any weldless or tire chain (R. 622, 1257-8). The freight equalization method of selling weldless chain was first adopted prior to the time any of the respondent manu- 986
facturers entered this field (R. 621), by companies which made only weldless chain and did not make or sell any welded or tire chain (R. 622, 1257-8). The universal delivered price method of selling tire chain was first adopted when only one company could legally make this type of chain (R. 622) and this company did not make or sell any welded or weldless chain at that time (R. 1501).

These respective delivered price methods of selling chain were adopted by each respondent, as it entered the industry, by entirely independent action and without any agreement whatsoever (R. 987-9, 1015, 1029-30, 1275, 1288, 1292, 1486-92, 1501-2, 1534-8, 1678, 1706-7, 1866-7, 1972-3, 1998, 2128, 2139-41, 2226-35, 2265-7); have been main- 987
tained by entirely independent action and without any agreement or understanding (R. 998, 1033-4, 1296, 1605, 1694, 2000, 2133, 2149-50); and have never been discussed between or among any of these respondents (R. 994-8, 1023-4, 1032-3, 1295-6, 1482-3, 1537, 1575-7, 1605, 1679-80, 1693, 1707, 1717, 1866-7, 1928-30, 1935-7, 1999, 2087-9, 2129-30, 2140, 2145, 2148-9, 2299-2300).

(h) *The Campbell Letters.* The evidence in this proceeding contains a number of letters written by George

J. Campbell, Sr., who was president of respondent International until September 1941. In that month and year, George J. Campbell, Sr., died, and he was not, of course, available for examination or cross-examination by any party to this proceeding with reference to the aforesaid letters. The letters were written by Mr. Campbell to a concern which acted as respondent International's sales representative in the sale of the latter's chain, and to salesmen of such concern.

The letters are subject to conflicting inferences, and counsel supporting the complaint urge that some of them sup-
989 port inferences of collusion among the respondent manufacturers, or some of them, and with the respondent Institute, to fix prices. Counsel for the respondents, on the other hand, contend that such inferences of collusion cannot properly be drawn in the face of credible, uncontradicted testimony to the contrary; inconsistencies in the letters themselves; lack of cross-examination of Mr. Campbell, Sr.; lack of any opportunity to obtain his explanation of what he wrote; testimony and other evidence showing that some of the letters were wholly incorrect; and testimony showing that Mr. Campbell, Sr., had an ulterior business motive to exaggerate or misstate facts to his aforesaid sales representative, namely, to stiffen the backbones of such sales representative and its salesmen to
990 resist buyers' demands for extra discounts and lower prices than those published by respondent International.

In view of the Commission's duty to find facts only if supported by substantial evidence in the light of the whole record, which is tantamount to a duty to find facts only on the greater weight of the evidence, the Commission finds that the Campbell letters do not, in the light of the entire record, support the inferences of collusion urged by the attorneys supporting the complaint.

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There is nowhere in any of the Campbell letters anything to support, even inferentially, any charge that either the "Pittsburgh plus", the "freight equalization" or the "universal delivered price" method of selling was adopted, used or continued by understanding, agreement, combination or conspiracy. Also, there is no reference in these letters to sash or kindred chain.

PARAGRAPH FOUR. *Tire Chain Patent Licenses.* Respondent American, originally known as Weed Chain Tire Grip Company, was the original manufacturer of tire chains in this country, with exclusive rights under certain basic controlling patents. After these basic patents expired in 1921, other companies began to manufacture and sell tire chains. As part of a continuing program of research seeking improvements in tire chains respondent American, toward the end of the 1920's, acquired ownership and control of certain patented inventions covering improvements in tire chains which for simplicity are referred to here as bar-reinforced tire chains (R. 614). Respondent American entered into patent license agreements with respondents McKay, Hodell, Pyrene, St. Pierre and Taylor, who are sometimes referred to hereinafter as "licensees" (R. 615). No such patent license agreements were ever entered into with respondents Cleveland, Bridgeport, Round California, Seattle, Woodhouse, Columbus McKinnon, International, Nixdorff-Krein, Peerless, Western, Russell or Turner & Seymour, and there was at no time any connection between these license agreements and respondent Institute, respondent Merriman or any officer, director, employee or agent of respondent Institute (R. 1317, 1756-7, 2081).

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The patent license agreements (Com. Ex. 449-63) provided that the said licensee manufacturers at their option

might either manufacture their own bar-reinforced links or have the same manufactured for them by American, which latter practice was actually followed by all of the licensees except McKay. The bar-reinforced tread chain members that were supplied by American were in rough unfinished form; they were unhardened, unpolished and unplated and consisted simply in short lengths of three or four reinforced treated links without end-connecting hooks. Before the links so supplied could be adapted to any useful purpose, extensive work and processing was required on the part of the licensee, including hardening
995 by special heat treatment, tumbling, polishing and plating the cross links, and fitting and adding special cross chain hooks adapted to connect the cross chains with the side members into an anti-skid tire chain. All these several steps were performed by the licensee at its plant and all of these parts except the rough untreated tread chain members were made or supplied by the licensee. Said agreements with American also contained a provision whereby the licensees were required to observe minimum prices and discounts specified by American in selling chains covered by the licenses, which provision, however, was cancelled and released by American in December, 1942, prior to the filing of the original complaint herein (R. 615-16).

Various types of so-called "reinforced" tire chains have
996 been developed and manufactured by respondents Columbus-McKinnon, International, Peerless, Western and Cleveland (Res. Ex. 32, 33, 40, 41). Respondent Nixdorff-Krein sells the Peerless reinforced chain (R. 2300), and beginning with the war period Western has sold the Peerless chain instead of its own (R. 2156). At all times each of the non-licensees which is in the tire chain field has been actively competing with American and its licensees in the sale of these reinforced tire chains. The license agree-

ment with McKay was terminated in 1939, because McKay felt it necessary to sell its chain at lower prices than those provided for by the license agreement in order to meet the competition of International (R. 1133-4).

The making of the first license agreement with McKay was preceded by bona fide litigation between American and McKay (R. 1133), and all the license agreements were entered into in good faith by the parties thereto. The agreement with McKay was terminated completely in February 1939 (R. 615), and a provision as to the licensees' observance of minimum prices and discounts was cancelled and released as to all licensees in December 1942, prior to 998 the filing of the original complaint in this proceeding.

The license agreement arrangement concerned only respondent American and the licensees. No other respondent has at any time had any connection whatsoever with this arrangement or done anything whatsoever to further any of the purposes of such arrangement.

PARAGRAPH FIVE. *Shirley, Olcott & Nichols Arrangement.* In 1937, respondents American, McKay, Pyrene and Hodell entered into an arrangement with respondents Shirley, Olcott & Nichols under which Shirley, Olcott & Nichols were to act as manufacturers' sales representatives in the sale to the Federal government of tire chains manufactured by these respondents (R. 616-7). 999 Respondents Taylor and St. Pierre became parties to this arrangement as of January 1, 1940 (R. 617). Respondent McKay withdrew from the arrangement on June 30, 1940, and thereafter had no dealings with Shirley, Olcott & Nichols (R. 617). None of the non-licensees was at any time a party to this arrangement (R. 1351-2, 2044-5).

Neither respondent Institute nor respondent Merriman nor any officers, directors, employees or agents of the respondent Institute had any connection whatsoever with this Shirley, Olcott & Nichols arrangement (R. 2079-80). The entire arrangement was terminated on October 15, 1942 (R. 619) prior to the issuance of the original complaint in this proceeding.

There is no evidence that either Shirley, Olcott & Nichols or any of the respondent manufacturers ever improperly or fraudulently secured approval by any government officials of any tire chain specifications.

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Shirley, Olcott & Nichols were engaged in the business of representing manufacturers in many lines in the sales of their merchandise. They carried a stock of tire chains and were found by the United States Department of Labor to be a "regular dealer" in that commodity within the meaning of the Walsh-Healey Act.

Under the arrangement, Shirley, Olcott & Nichols received orders for the tire chains; entered such orders on their books; made out on their own form an order for each such order for chains; selected one of the respondent manufacturers, party to the arrangement, to fill and ship such order; forwarded their order form to such selected manufacturer; after receipt by them of such manu-

1002 facturer's invoice made out to them, prepared and sent their own invoice to the purchaser of the chains; received payment of their invoice and then remitted to the manufacturer their check for the amount of the payment less a deduction of 7½% of the payment, such percentage being retained by respondents Shirley, Olcott & Nichols as their profit on the transaction.

In accordance with this arrangement and in response to advertisements for bids issued by the Procurement Divi-

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sion of the Treasury Department Shirley, Olcott & Nichols from time to time during the years 1937 to 1942, inclusive, submitted bids on bar-reinforced tire chains. Such bids were submitted in the name of Shirley, Olcott & Nichols. After contracts were awarded to Shirley, Olcott & Nichols, the Federal agencies for whom such contracts were let submitted orders directly to Shirley, Olcott & Nichols. This arrangement was known to and accepted by officials of the Procurement Division.

During the period of the first contract entered into by Shirley, Olcott & Nichols with the Procurement Division in 1937, Government agencies sent Shirley, Olcott & Nichols 1004
orders for unpatented tire chains as well as for the so-called bar-reinforced tire chains. As a result, it was necessary for Shirley, Olcott & Nichols to write to the agencies submitting such orders that it had no contract for the supplying of the standard unpatented tire chains. It was suggested by the Procurement Division to Shirley, Olcott & Nichols that the arrangement be extended to cover the unpatented type of tire chains. Thereupon the arrangement between Shirley, Olcott & Nichols and respondents American, McKay, Pyrene and Hodell was extended to cover all types of tire chains manufactured by them. During the years 1939 to 1942, inclusive, the arrangement covered unpatented as well as bar-reinforced tire chains (R. 617-19).

During the time that this Shirley, Olcott & Nichols ar- 1005
rangement was in effect the said respondent manufacturers whose chains Shirley, Olcott & Nichols were then handling, and other respondent manufacturers, submitted bids from time to time directly to the Procurement Division, covering either unpatented or patented reinforced tire chains, or both, and some were in many instances awarded contracts, to-wit, respondents Cleveland, Columbus-McKinnon, International and McKay (R. 619).

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There was no connection whatsoever between the respondents shown above to have been parties to this Shirley, Olcott & Nichols arrangement and any other respondents in this proceeding, and none of such other respondents ever did anything whatsoever to further this arrangement or any of the purposes hereof. None of the respondents which was a party to this arrangement ever exerted any influence or control over any non-participating respondent in connection with any of the matters involved in this arrangement or ever attempted to do so.

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PARAGRAPH SIX. *"Pittsburgh Plus" Method of Selling Welded Chain.* (a) Welded chain is generally sold on what is commonly referred to as the "Pittsburgh-plus" method (R. 620). The manufacturer's published price list states that the welded chain is sold at so many dollars and cents per pound "f.o.b. Pittsburgh". This means that the buyer pays the railroad the exact amount of freight from the seller's shipping point to the buyer's delivery point, but there is an adjustment on the invoice which produces the end result that the buyer pays the seller the list price plus the amount of freight from Pittsburgh to the buyer's delivery point. If the actual freight paid by the buyer to the railroad is greater than the freight from Pittsburgh to the buyer's delivery point, the buyer receives a credit on the invoice in the amount of that difference. If the actual freight paid by the buyer to the railroad is less than the freight from Pittsburgh to the buyer's delivery point, the amount of that difference is charged to the buyer on the invoice (R. 983-6). The "Pittsburgh-plus" method has not been used for all types of welded chain. Exceptions include alloy chain (R. 1921), stud link anchor chain (R. 989-93, 1479) and wrought iron chain (R. 1922-4).

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In an instance where the actual freight paid by the buyer to the railroad is less than the freight from Pittsburgh to the buyer's delivery point, the extra amount which is charged to the buyer on the invoice is sometimes referred to as "phantom freight". The largest welded chain manufacturers, by reason of the location of their plants in relation to their markets, are required to absorb a greater amount of freight than the amount they realize as "phantom freight" and thus show a net loss in this aspect of the "Pittsburgh-plus" method (R. 1020, 1023, 1486, 1495, 1775).

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Since the issuance of the original complaint, certain respondents have changed from this method of selling welded chain. Respondent Taylor has not used this basis of selling since June 1945 (R. 620), but has sold welded chain f.o.b. its factory at Hammond, Indiana, equalizing with Pittsburgh and with Winona, Minnesota (R. 1924). Respondent Peerless now sells f.o.b. Winona, Minnesota (R. 1926, 2131). Respondent Western still publishes prices on the f.o.b. Pittsburgh basis but lowers its prices in specific instances in order to meet the lower prices quoted by Taylor and Peerless (R. 2131), and respondent Nixdorff-Krein likewise meets the competition of Taylor (R. 2298). The larger manufacturers have not made any change in their selling method to meet the lower prices of Taylor or Peerless because the demand for welded chain in relation

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to the limited supply which can be made because of steel shortages has not yet made it necessary for them to meet this competition (R. 1888).

Another variation occurs in the case of sales by respondents Seattle and Round California which are located on the Pacific Coast (R. 1696-1705). These two companies publish the same base or list prices as the eastern manufacturers, plus an additional charge of $1.70 per hundred

pounds. This $1.70 is computed by adding to the carload freight rate of $1.47 per hundred pounds (the less-than-carload rate is $3.67 per hundred pounds) a charge of 23 cents per hundred pounds to cover the cost of handling the chain, cutting it up into pieces as ordered, and shipping it to various other basing points along the Pacific Coast (R. 1698). The freight rate of $1.47 per cwt. to the Pacific Coast would apply whether the chain was shipped from Pittsburgh or Cleveland (R. 1699).

(b) This "Pittsburgh-plus" method of selling welded chain has been in use since at least 1900 (R. 620, 989, 1477).
1013 It was adopted by other chain manufacturers before any of the respondents in this proceeding entered the industry (R. 620). The original manufacturers of welded chain were led to adopt this method because the same method was used by the basic steel industry from which they procured their requirements of steel rod used in the manufacture of welded chain (R. 620). As a result of the long established use of the "Pittsburgh-plus" method of selling welded chain by other manufacturers, each respondent manufacturer adopted this same method when it entered the field (R. 620). They still use this method because of habit, because it has always been done that way (R. 1156, 1490), and no customers have ever complained (R. 1490-1).

(c) There has been no collusion or concerted action of
1014 any kind among any of the respondents in either adopting or continuing to use the "Pittsburgh-plus" method of selling welded chain. None of the respondents has ever discussed this selling method with any of its competitors (R. 994-8, 1482-3, 1493, 1605, 1679-80, 1928-30, 2087-8, 2129-30, 2299), and all have considered themselves perfectly free to change to some other method of selling if they think that in their individual self-interest it would be a wise move (R. 998, 1605, 1681, 2133). Respondent

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Taylor changed to an f.o.b. factory basis on advice of counsel (R. 1927), and at the time Taylor made this change no other respondent made any attempt to persuade Taylor to continue to use the "Pittsburgh-plus" method (R. 1930).

(d) The respondent Institute employed Charles Donley in 1933 to compile freight rates relating to welded chain from Pittsburgh, Pennsylvania to destinations throughout the United States and to revise this compilation from time to time (R. 612). Mr. Donley is an independent traffic consultant and represents a number of clients in freight rate matters (R. 2343). In 1933, during the existence of the N.R.A. program, the welded chain manufacturers found it necessary to have available a compilation of freight rates from Pittsburgh to various points in order to enable them to comply with the Code by strictly observing prices filed with N.R.A. (R. 1203). To save costs the Institute (then the Code Authority) had this job done for all members instead of each member having it done separately (R. 1203-4). The rates shown in the compilation were actual freight rates from Pittsburgh to various destinations revised from time to time to keep them as accurate as it was possible for Mr. Donley to compute them (R. 1202). In addition to compiling the so-called Donley freight rate book, Donley has performed such other services for the Institute, down to and including the present, as watching for proposed changes in freight rates which would affect the chain industry (R. 2342) and representing the chain industry at rate hearings before the Interstate Commerce Commission (R. 1236, 2338).

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There was no agreement or understanding among the respondents that they would use the Donley freight rate book (R. 2134). It was issued as a matter of convenience for each of them to use or not use as the individual saw fit (R. 2340). Some members of the Institute did not use the

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Donley book at all (R. 1681-3, 1705-6, 1886). Other respondents did not use the Donley book exclusively, using both the Donley book and some other freight rate service (R. 1981-3, 2134, 2299). Since the Donley book could be used only in connection with sales of welded chain, it was, of course, never used by respondents Pyrene, St. Pierre, Russell or Turner & Seymour who have never manufactured or sold welded chain.

PARAGRAPH SEVEN. "*Freight Equalization Method of Selling Weldless Chain.*" (a) Weldless chain is generally sold on what is commonly referred to as a "freight equalization" method (R. 621). The manufacturer's published price list states that the weldless chain is sold at so many dollars and cents per foot f.o.b. the manufacturer's plant with freight equalized with all other manufacturing points, usually Bridgeport, Conn., Cincinnati, Ohio, Cleveland, Ohio, or York, Pa.

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The freight is "equalized" in the following manner: The buyer pays the railroad the exact amount of freight from the seller's shipping point to the buyer's delivery point. If the freight from the nearest "equalization point" to the buyer's delivery point is less than the actual freight thus paid by the buyer, the buyer receives a credit on the invoice in the amount of this difference. Thus the total amount paid by the buyer is the seller's basic f.o.b. price plus the amount of freight from the nearest equalization point (R. 621, 1003-8). The four equalization points just named are not used indiscriminately as equalization points on sales of all types of weldless chain, but only with respect to sales of such particular types of weldless chain as are actually manufactured at the particular equalization point in question (R. 1014).

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(b) Weldless chain (other than sash and kindred chain) was first made by respondent Bridgeport, at Bridgeport, Conn. (R. 1274). Some time prior to 1908, Oneida Community at Oneida, N. Y., commenced manufacturing and selling weldless chain (R. 1257-8). Neither of these companies made or sold welded chain or tire chain (R. 1257-8). In 1908, respondent Bridgeport sold its weldless chain f.o.b. Bridgeport, freight equalized with Oneida, and Oneida sold its weldless chain f.o.b. Oneida, freight equalized with Bridgeport (R. 1260). In about 1909 or 1910 Cleveland Galvanizing Company (predecessor of respondent Hodell) entered the picture and Bridgeport and Oneida began equalizing with Cleveland also (R. 1261). In 1912 respondent American (or its predecessor, Weed Chain Tire Grip Co.) purchased the weldless chain business of Oneida and moved the machinery to Bridgeport, Conn. (R. 1262) so that Oneida, N. Y., dropped out of the picture as an equalization point (R. 1263). Thus at that time there were three manufacturers of weldless chain, two in Bridgeport and one in Cleveland, each selling f.o.b. its plant and equalizing freight with the other point where necessary to meet the competition of the seller at that point. In the early 1920's Cincinnati Pump Company (not a respondent in this proceeding) began producing a few types of weldless chain (R. 1264). To meet the competition of this newcomer the existing companies began equalizing with Cincinnati on the types of weldless chain made there (R. 1265). In 1927 American moved its weldless chain machinery to York, Pa., and began selling weldless chain f.o.b. York with freight equalized with Bridgeport, Cleveland or Cincinnati as to types of weldless chain made at those places (R. 1265). Respondent McKay with its plant at York (theretofore a manufacturer only of welded and tire chain) began making a commercial weldless chain in 1928 (R. 1001), and began selling it f.o.b. York, equalizing freight with the other points

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at which weldless chain was manufactured (R. 1003). Respondent International with its plant at York began to sell weldless chain commercially in the late 1930's (R. 1603). Respondent Cleveland had begun manufacturing commercial weldless chain in very small quantities some time after 1910 (R. 1665).

(c) Thus respondents American, McKay, International, Bridgeport, Hodell and Cleveland (and the Cincinnati Pump Company) each sells f.o.b. its own factory and equalizes freight with other producing points where necessary to meet competition from those points. By equalizing
1025 freight in this manner these companies charge a lower total delivered price in some instances in order to meet the lower total delivered prices quoted by their competitors on an f.o.b. factory basis. This equalization in no instance involves any "phantom freight" (R. 1006).

Other respondents which sold but did not make weldless chain were Nixdorff-Krein, Peerless, Taylor, Western, Round California, Seattle, Columbus-McKinnon and Woodhouse. A chain company which does not manufacture weldless chain does not solicit customers or desire to sell weldless chain but is forced to buy it from other chain companies in order to satisfy its regular customers for welded and tire chain when they include orders for weldless chain with orders for other types of chain (R. 2136-7). A non-manu-
1026 facturing company sells f.o.b. the nearest point of manufacture to the customer's delivery point. In order to sell this weldless chain which it does not manufacture, a respondent purchases it from a manufacturer on the basis of f.o.b. the closest manufacturing point to such respondent's place of business, paying the manufacturer's price, plus freight from the f.o.b. point, plus costs of repacking, etc., less a "courtesy discount" (R. 1932, 2187). This respondent then resells the chain f.o.b. the nearest point of manu-

facture to the customer's delivery point, having to absorb freight in many cases. In no case is it possible for there to be any element of "phantom freight" since the respondent has already paid freight to its place of business.

Respondents Western and Peerless now manufacture a small volume of weldless chain themselves. Respondent Peerless began making weldless chain in 1941 (R. 1934); has a very small production capacity (R. 1935), and sells f.o.b. Winona, Minn., where its plant is located (R. 1693). Western began making weldless chain in 1945 (R. 2135) and since that time has sold it f.o.b. Chicago where its plant is located, equalizing with other points of manufacture (R. 2141). Most other manufacturers have not been equalizing with Chicago or Winona yet, because of the small volume produced by Western and Peerless and because in today's "sellers' market" it is not necessary to meet this competition (R. 1888). 1028

(d) The preceding paragraphs (b) and (c) apply only to weldless chain other than sash and kindred chain. Sash and kindred chain has a history different from that of the other types of weldless chain.

In 1908, the only manufacturers of sash and kindred chain of any importance were Smith & Egge, respondent Turner & Seymour and respondent Russell (R. 1258). Turner & Seymour bought out Smith & Egge in 1932 (R. 2263). Respondents Turner & Seymour and Russell have never manufactured any chain other than sash or kindred chain (R. 2244, 2261). 1029

Prior to about 1932, Turner & Seymour sold its chain f.o.b. Torrington, Conn., the location of its plant (not far from Bridgeport), with a freight allowance up to 30¢ per 100 pounds on orders of 100 pounds or over. It cut its prices where necessary to meet the competition of Smith

& Egge (R. 2263-4). After purchasing Smith & Egge, Turner & Seymour adopted the practice of equalizing freight with York, Pa., Bridgeport and Cleveland in order to compete with sellers located at those points (R. 2265-6). Respondent Russell, prior to 1933, sold its chain f.o.b. Naugatuck, Conn., the location of its factory (not far from Bridgeport), and allowed freight where necessary to meet the price of a competitor (R. 2245). When prices were filed under N.R.A. Russell learned of the freight equalizing method used by his competitors and decided he could best promote country-wide sales of his chain by adopting that
1031 method (R. 2246-7), which actually was merely a formalization of his prior practice of meeting competition. No so-called "phantom freight" has ever been involved in any sales made by either Turner & Seymour or Russell (R. 2252, 2275).

A special type of sash and kindred chain is so-called furnace chain. The principal producer of this item is the Holland Furnace Company of Holland, Mich., which entered the picture during 1930 (R. 1692). When the Holland Furnace Company has a surplus supply of furnace chain (above what it needs for sale with regulators for furnaces) it sells this chain separately f.o.b. Holland, Mich. (R. 1016, 1271). The few respondent manufacturers who sell furnace chain sell it f.o.b. their plants equalizing freight with
1032 Holland, Mich., and with Cleveland, Bridgeport and York (R. 1016, 1271, 1692, 2267).

(e) Each of the respondent manufacturers adopted this method of selling weldless chain (and sash and kindred chain) as a matter of independent business judgment because customers were used to buying it on this basis and because it was necessary in order to do business outside the area surrounding the individual manufacturer's plant (R. 1001-2, 1015-16, 1973, 2139). All the respondent manu-

facturers have continued to use this method of selling weldless chain as the result of exercising their individual judgment and there has been no agreement or understanding among them to continue to use it (R. 1034, 1605, 1694). No respondent has ever discussed this selling method with any competitor (R. 1023-4, 1605, 1693, 1866-7, 1935, 2088-9, 2140, 2299). There is no evidence that the respondent Institute or respondent Merriman or any of the respondent manufacturers has ever done anything for the purpose of, or with the effect of, exerting any influence on any respondent manufacturer to continue using this method of selling weldless chain.

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PARAGRAPH EIGHT. *"Universal Delivered Price Method of Selling Tire Chain."* (a) Tire chain is generally sold on what is commonly referred to as the "universal delivered price method" (R. 622). The manufacturer's published price list states that the tire chain is sold at so many dollars and cents per pair, f.o.b. the manufacturer's plant with full freight allowed from the manufacturer's place of shipment to the buyer's delivery point (R. 622, 1028). The buyer pays the railroad the actual transportation charge and the chain manufacturer makes an allowance of that same amount on the invoice (R. 1028). This freight allowance is applicable only on a certain minimum shipping quantity (R. 1030) which at present is generally 24 pairs of passenger chains, or the equivalent, for the majority of the tire chain manufacturers, but which has been in the past as much as 500 pairs (R. 1030). This minimum shipping quantity is not now and has not at any time been the same for all tire chain manufacturers (R. 1604, 2147). The result of selling the minimum quantity (or more) at a price f.o.b. factory with full actual freight allowed is that the freight allowance cancels the freight the buyer has paid and the chains cost a buyer the same re-

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gardless of where he is located with reference to the manufacturer's plant.

(b) Tire chains were first manufactured and sold in the United States in about 1905 by the Weed Chain Tire Grip Company, which was the predecessor of respondent American. The Weed Chain Tire Grip Company manufactured tire chains under the so-called Weed patent and by virtue of an exclusive license under the so-called Parsons patent (R. 1498). During the period between about 1907 and 1916 there was a great deal of manufacturing of tire chains in infringement of these patents (R. 1502, 1505), including
1037 some infringing manufacture by some of the respondents in this proceeding (R. 1513).

One minute after expiration of the Parsons patent on August 24, 1921, the United States Chain & Forging Company (predecessor of respondent McKay) began manufacturing tire chain (R. 873). Other companies which began to manufacture tire chains in 1921 upon expiration of the Parsons patent were respondents Pyrene (R. 1991), Cleveland (R. 1669) and St. Pierre (R. 1527). Other respondent manufacturers commenced to manufacture tire chains at various subsequent dates, respondent Taylor in 1932 (R. 1920) and respondent Nixdorff-Krein in 1936 (R. 2300). In the category of "absolute newcomers" who have just begun manufacturing tire chain are United States
1038 Chain Company at Chicago and Dixon Chain Company at Dixon, Illinois (R. 1358, 1367).

(c) The Weed Chain Tire Grip Company adopted the "universal delivered price" method of selling tire chains when it commenced business as being the only practicable way to get large volume national distribution (R. 622, 2214). The company felt that this method of selling was necessary in order to have the tire chains sold to the consumer at a low price everywhere in the country (R. 2214).

Also, in order to get this national distribution it was necessary for the company with its small capital to deal through jobbers and distributors and manufacturers' sales representatives, all of which concerns, working in the automotive accessory field, bought their other lines of auto accessories on the basis of a uniform price delivered at the place of business of the distributor. Therefore, use of this selling method was necessary in order to sell through these distributors (R. 2215).

Other respondent manufacturers entered the tire chain field and adopted this method of selling, which had by that time been long established (R. 622, 1058, 1709). One manufacturer attempted to sell on an f.o.b. factory basis without allowing freight but found that his customers insisted that freight be allowed (R. 1576). The respondent manufacturers of tire chain who entered the field in 1921 and after, adopted this pricing method because they found it a sound one from a business standpoint and because it was used by American, the first company in the field (R. 622, 1058, 1576, 1709, 1998), and because practically all types of automotive parts and accessories were and are sold under this pricing method (R. 1297, 1501, 1998, 2149). 1040

(d) Each of respondent manufacturers adopted this method of selling tire chain as a matter of independent business judgment and not as the result of any collusion with other respondents. The use of this method has been continued as a matter of independent judgment (R. 1033, 1605, 2000, 2149), because it has appeared to be a sound business method and because purchasers of tire chains from respondent manufacturers are universally satisfied with this pricing method (R. 1297, 1504, 2149-50). None of the respondent manufacturers has ever discussed this selling method with any of its competitors (R. 1032-3, 1295-6, 1537, 1575-7, 1605, 1707, 1717, 1936-7, 1999, 2088-9, 2145, 2148-9, 2300). 1041

1042 PARAGRAPH NINE.—*Public Interest.* If tire chains were sold on a straight f.o.b. factory basis instead of under the delivered price method, various respondent manufacturers would not be able to compete as at present on a national scale but each would be confined roughly to an area closer to its own factory than to the factories of the various competitors (R. 1071, 1467, 1615). Since demand for tire chain is directly related to weather conditions, and since weather conditions in a particular locality vary from year to year and there is no locality in the United States which has such weather that it is always a good tire chain
1043 market (R. 1066-7), competition in the sale of tire chains can be effective only if it is on a national scale.

If respondent manufacturers which sell welded chain and weldless chain should be required to abandon use of the delivered price methods of selling and sell on a straight f.o.b. factory basis without making any freight adjustment the effect would be to restrict each such respondent manufacturer's sales of welded and weldless chain to a market area closer freightwise to its factory than to the factory of any competitor (R. 1074, 1313-14, 1444, 1615, 1725-8). There would not be effective price competition near the boundaries of such local market area, since demand for chain is concentrated in localities which are not generally in the areas where such boundaries would be (R. 1857).

1044 The effect of this restriction of market areas would be to increase substantially the costs of producing and selling chain which would in turn cause a higher cost to purchasers of welded, weldless and tire chain (R. 1074, 1314, 1443, 1725, 1728). Also, because there are three large producers at York, Pennsylvania, which combined have a capacity far in excess of any conceivable demand in that area (R. 1617, 1620), one or more of these manufacturers at York would be forced out of business (R. 1074, 1443, 1615).

With two sizeable manufacturers in Cleveland, it is probable that a similar situation would occur there (R. 1725, 1728).

The factories of the respondent manufacturers were not established in their existing locations with any view to locating them close to markets (R. 1077-8) but for the following reasons: (1) some purchased existing plants, (2) others considered such factors as availability of labor both skilled and unskilled, availability of power and availability of raw materials, and (3) some merely liked to live in that community (R. 1076, 1345, 1766-7).

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To move an existing plant to a new location might cost as much as $1,000,000 or more, depending on the size of the particular plant. The current shortages of construction materials and labor would make it difficult to move a chain plant in the near future. Welded chain, weldless and tire chain are essential military items and also important items in the civilian economy generally, and are currently in short supply because of shortages of steel rods used in making chain. Therefore, it would not be in the public interest to enter any order in this proceeding which would have the effect of requiring such a relocation of the chain industry.

PARAGRAPH TEN. The Commission concludes from the evidence and finds that: 1047

(a) None of the respondent manufacturers, acting either among themselves or through respondent Institute or any other respondent, has entered into, engaged in or carried out any understanding, agreement, combination, conspiracy or planned common course of action to adopt or use the so-called "Pittsburgh Plus" method of selling welded chain.

(b) None of the respondent manufacturers, acting either among themselves or through respondent Institute

or any other respondent, has entered into, engaged in or carried out any understanding, agreement, combination, conspiracy or planned common course of action to adopt or use the so-called "freight equalization" method of selling weldless chain.

(c) None of the respondent manufacturers, acting either among themselves or through respondent Institute or any other respondent, has entered into, engaged in or carried out any understanding, agreement, combination, conspiracy or planned common course of action to adopt or use the so-called "universal delivered price" method of selling
1049 tire-chain.

(d) None of the respondent manufacturers, acting either among themselves or through respondent Institute or any other respondent, has entered into, engaged in or carried out any understanding, agreement, combination, conspiracy or planned common course of action to fix prices (including discounts) or otherwise to restrain competition in price or otherwise in the sale of any chain or chain products.

(e) Neither the respondent Institute nor respondent Merriman nor any other officers, directors, employees or agents of respondent Institute were parties to or vehicles for any understanding, agreement, combination, conspiracy or planned common course of action to fix prices, to
1050 restrain price competition or to restrain or lessen competition in any way.

(f) No respondents other than American and its licensees were parties to or had any connection with the bar-reinforced patent license agreements. The price maintenance provisions in such licenses were terminated in December, 1942, and there is no reason to apprehend a renewal of such a price maintenance agreement.

(g) None of the respondents other than American, American's licensees and Shirley, Olcott and Nichols have been parties to or in any way connected with the Shirley, Olcott and Nichols arrangement described in Paragraph Five hereof. The Shirley, Olcott and Nichols arrangement was terminated in its entirety in October, 1942, and there is no reason to apprehend a renewal of this arrangement.

(h) Neither the adoption nor the use by the respondent manufacturers of any of the three delivered pricing methods described in Paragraphs Six, Seven and Eight hereof has eliminated or lessened price or other competition between or among said respondent manufacturers. 1052

(i) There has, at all times during the period covered by the amended complaint in this proceeding, been vigorous competition in price and otherwise between and among the respondent manufacturers.

(j) The effect of requiring each of the respondent manufacturers to sell chain only at an f.o.b. factory price which is uniform as to all customers wherever located, without equalizing or absorbing freight or otherwise being permitted regularly to meet the lower delivered prices of competitors in the latter's freight-advantage territories, would probably be to lessen competition, in price and otherwise, between and among the respondent manufacturers. It would restrict each respondent manufacturer's sales to its own freight-advantage territory which, in many instances, would provide an insufficient volume of chain business to support such respondent manufacturer's factory, the probable result being that some such factories would have to be moved at great expense or go out of business with resulting disruptive effects upon employment, housing, the economy generally, and the Nation's productive capacity for a product which is a war necessity. 1053

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(k) Whether the amended complaint is treated as charging only one alleged conspiracy or a number of separate, disconnected alleged conspiracies, there is no substantial evidence to support any of such charges.

PARAGRAPH ELEVEN. *Recommended Conclusions:*

(a) The aforesaid acts and practices of the respondents (eliminating from present consideration the patent license arrangement and the Shirley, Olcott and Nichols arrangement), under the conditions and circumstances set forth, do not constitute unfair methods of competition in com-
1055 merce within the intent or meaning of Section 5 of the Federal Trade Commission Act and do not constitute unfair or deceptive acts or practices within the intent or meaning of Section 5 of the Federal Trade Commission Act.

(b) It is not in the public interest to consider further the question whether inclusion of the price maintenance provision in the bar-reinforced patent licenses prior to December 1942 constituted an unfair method of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act,

(c) It is not in the public interest to consider further whether the Shirley, Olcott and Nichols arrangement, prior to October 1942, constituted an unfair method of competi-
1056 tion in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

COUNT II

PARAGRAPHS ONE and TWO. As Paragraphs ONE and Two of its Findings of Fact under this Count II, the Commission incorporates so much of Paragraphs ONE and Two of its Findings of Fact under Count I as describe the respondent manufacturers, the industry and business of the respondent manufacturers, and the interstate nature of their sales of chain and chain products.

PARAGRAPH THREE. *"Pittsburgh Plus" Method of Selling Welded Chain.*

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(a) As part of its Findings of Fact, under Paragraph THREE of this Count II, the Commission incorporates Paragraph SIX of its Findings of Fact under Count I describing the "Pittsburgh Plus" method of selling welded chain.

(b) Respondent Taylor has been selling welded chain f.o.b. its factory at Hammond, Indiana, since June, 1945 (R. 620, 1924); respondent Peerless sells welded chain f.o.b. its factory at Winona, Minnesota (R. 1926, 2131); and respondents Western and Nixdorff-Krein varied from the "Pittsburgh Plus" method of selling welded chain to the extent necessary to meet this competition of respondents Taylor and Peerless (R. 2131, 2298).

(c) The "Pittsburgh Plus" method of selling has never been used in the sale of stud link anchor chain (R. 989-93, 1059
1479, 1533), alloy chain (R. 1921), or wrought iron chain (R. 1922-24).

(d) There is no evidence in the record whatsoever as to the competitive relationship, if any, between any buyer of welded chain from any respondent manufacturer and any other buyer of welded chain from such respondent manufacturer.

1060 *Respondents' Proposed Findings of Fact, Conclusions and Order.*

(e) There is no evidence in the record that, by virtue of the "Pittsburgh Plus" method of selling or otherwise, any buyer of welded chain paid any higher or lower price to any respondent manufacturer than any other buyer of welded chain from such respondent manufacturer who was in competition with such first buyer.

(f) The respondent manufacturers that sell welded chain are in competition with each other in the sale thereof. There is no evidence that the adoption or use of the "Pittsburgh Plus" method of selling welded chain has any reasonable possibility of lessening competition between such
1061 respondent manufacturers. The evidence shows on the contrary that there has, at all times, during the period covered by the amended complaint, been vigorous competition, in price and otherwise, between and among the respondent manufacturers in the sale of welded chain.

PARAGRAPH FOUR. *"Freight equalization" method of selling weldless chain.*

(a) As part of this Paragraph Four of its Findings of Fact, under this Count II, the Commission incorporates Paragraph SEVEN of its Findings of Fact under Count I describing the "freight equalization" method of selling weldless chain.

1062 (b) Any difference between the delivered price paid by any buyer of weldless chain to any manufacturer thereof and the delivered price paid to such manufacturer by any other buyer thereof in any other location, is (insofar as such difference is caused by such manufacturer's use of the "freight equalization" method of selling) the result merely of the difference in freight cost resulting from the differing distances of such buyers from a factory or factories at which weldless chain is manufactured and sold.

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(c) Insofar as the "freight equalization" method of selling weldless chain resulted in any respondent manufacturer charging a lower delivered price to a customer located at a distance from such manufacturer's plant than to a customer located nearer to such manufacturer's plant, such lower delivered price was always made in good faith to meet an equally low delivered price of a competitor of such manufacturer, which lower delivered price of such competitor was, in all instances, the sum of such competitor's price f.o.b. its factory, less whatever discounts the competitor allowed, plus the freight from such factory to the customer concerned.

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(d) There is no evidence in the record as to the competitive relationship, if any, between any buyer of weldless chain from any respondent manufacturer and any other buyer of weldless chain from such respondent manufacturer.

(e) There is no evidence in the record that any buyer of weldless chain from any respondent manufacturer paid a higher or lower price therefor than any other buyer thereof from such respondent manufacturer who was in competition with the first such buyer.

(f) The respondent manufacturers that sell weldless chains are in competition with each other. There is no evidence that the "freight equalization" method of selling weldless chain has any reasonable possibility of lessening competition between or among the respondent manufacturers. The evidence, on the contrary, shows that the use of this method of selling has permitted the respondent manufacturers to compete with each other throughout the United States and that there has been vigorous competition, in price and otherwise, among the respondent manufacturers, in the sale of weldless chain, during the entire period covered by the amended complaint.

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1066 *Respondents' Proposed Findings of Fact, Conclusions and Order.*

NOTE TO THE TRIAL EXAMINER: The respondents contend that Count II of the amended complaint does not fairly raise any issue with regard to the legality of the "universal delivered price" method of selling tire chains under the Robinson-Patman Act. Should the Examiner disagree with the respondents and wish to recommend to the Commission a finding with regard to the "universal delivered price" method under Count II of the amended complaint, the respondents, without waiving their contention above stated, propose the following finding on this subject:

1067 PARAGRAPH FIVE. *"Universal delivered price" method of selling tire chain.*

(a) As part of Paragraph FIVE of its Findings of Fact under this Count II, the Commission incorporates Paragraph EIGHT of its Findings of Fact under Count I.

(b) The result of the use of the "universal delivered price" method of selling tire chain by any respondent manufacturer is that, so long as the customer buys the minimum quantity required by such manufacturer in order to secure a freight allowance, such customer pays the same delivered price to such manufacturer for any particular type and size of tire chains, as such customer would pay if he were located anywhere in the United States. There is, thus, no difference in the delivered price which any cus-
1068 tomer pays to a particular respondent manufacturer, by virtue of this method of selling, and the price which any other customer of such manufacturer pays such manufacturer for the same item of tire chain.

(c) The "universal delivered price" method of selling is a common method used in consumer goods industries generally.

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(d) There is no evidence as to the competitive relationship, if any, between any buyer of tire chain from any respondent manufacturer and any other buyer of tire chain from the same respondent manufacturer.

(e) There is no evidence that any buyer of tire chain from any respondent manufacturer has paid a higher or lower price therefor than any other buyer thereof from such respondent manufacturer who was in competition with the first such buyer.

(f) The respondent manufacturers that sell tire chain are in competition with each other. There is no evidence that the use of the "universal delivered price" method of selling tire chain has any reasonable possibility of lessening competition between or among the respondent manufacturers. The evidence on the contrary shows that, during the period covered by the amended complaint, there was vigorous competition at all times, as to price and otherwise, in the sale of tire chain, among the respondent manufacturers.

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PARAGRAPH SIX. *Customer Discounts.*

(a) There is no evidence showing that any respondent manufacturer has established any discount classifications, or has given any discounts, which cause, or have caused, any customer of such respondent manufacturer to pay a higher or a lower price for any chain or chain product than any other customer of that same respondent manufacturer who is in competition with the first such customer.

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(b) There is no evidence as to the competitive relationship, if any, between any buyer of any type of chain or chain product from any respondent manufacturer and any other buyer of such chain or chain product from the same respondent manufacturer.

(Filed May 19, 1948.)

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PARAGRAPH SEVEN. The Commission concludes from the evidence and finds that:

(a) The use of the "Pittsburgh Plus" method of selling weldless chain by each individual respondent manufacturer and seller of welded chain has not had, and does not have, any reasonable possibility of substantially lessening competition or tending to create a monopoly in any line of commerce, or of injuring, destroying or preventing competition with any person.

(b) The use of the "freight equalization" method of
1073 selling weldless chain by each individual respondent manufacturer and seller of weldless chain has not had, and does not have, any reasonable possibility of substantially lessening competition or tending to create a monopoly in any line of commerce, or of injuring, destroying or preventing competition with any person.

NOTE TO THE TRIAL EXAMINER: Again the respondents contend that there is no issue under Count II of the amended complaint with regard to the "universal delivered price" method of selling tire chain, but submit the following proposed paragraph (without waiving their said contention) in case the Examiner wishes to use it:

(c) The use of the "universal delivered price" method of selling tire chain by each individual respondent manu-
1074 facturer and seller of tire chain has not resulted in any difference in price between different purchasers of tire chain from such respondent manufacturer or seller, and has not had, and does not have, any reasonable possibility of substantially lessening competition or tending to create a monopoly in any line of commerce, or of injuring, destroying or preventing competition with any person.

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PARAGRAPH EIGHT. *Recommended Conclusions:*

(a) None of the aforesaid acts or practices of any of the respondent manufacturers or sellers of welded chain has constituted or resulted in any discrimination in price in violation of the provisions of Section 2(a) of the Clayton Act, as amended.

(b) None of the aforesaid acts or practices of any of the respondent manufacturers or sellers of weldless chain has constituted or resulted in any discrimination in price in violation of the provisions of Section 2(a) of the Clayton Act, as amended.

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NOTE TO THE TRIAL EXAMINER: With the reservations previously mentioned, the respondents submit, purely for the convenience of the Trial Examiner, the following proposed conclusion with regard to the tire chain method of selling under Count II:

(c) None of the aforesaid acts or practices of any of the respondent manufacturers or sellers of tire chain has constituted or resulted in any discrimination in price in violation of the provisions of Section 2(a) of the Clayton Act, as amended.

PROPOSED ORDER

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On the basis of the foregoing proposed Findings of Fact and Conclusions, the respondents respectfully propose and urge that the Examiner recommend that the Commission issue an order in this proceeding, in customary form, dismissing the amended complaint in its entirety as to all respondents.

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Appendix to Memorandum to the Trial Examiner Filed on Behalf of The Turner & Seymour Manufacturing Company and The John M. Russell Manufacturing Company.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I.

As to The Turner & Seymour Manufacturing Company

1. The Turner & Seymour Manufacturing Company is incorporated under the laws of the State of Connecticut.

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2. The Turner & Seymour Manufacturing Company manufactures gray iron, brass and bronze castings, upholstery nails and thumb tacks, kitchen tools, tufting buttons, escutcheon pins, sash balances, a line of plumbing supplies and certain types of small chain.

3. The only types of chain which The Turner & Seymour Manufacturing Company produces are jack chain, safety chain, plumber's chain, sprocket chain, ladder chain, cable chain, universal chain, ship's telegraph chain, and sash chain.

4. All of these chains are light chains and with the exception of cable chain are made either by forming a knot in a length of wire or by stamping blanks from strip stock and folding and inserting them to form a continuous chain.

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5. All of these types of chain are known in the trade generally under the designation "sash and kindred chain" and are, in general, lighter chains than the chain referred to in the trade by the designation "weldless chain."

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6. The Turner & Seymour Manufacturing Company does not manufacture and never has manufactured tire chain, tie-out chain, pound chain, pump chain, trace chain, "Tenso" chain, or other types of chain known to the trade as "weldless chain."

7. The Turner & Seymour Manufacturing Company commenced to manufacture chain about 50 years ago at which time it manufactured only jack, ladder and safety chain and its business in these chains was small.

8. In 1923 The Turner & Seymour Manufacturing Company purchased several second-hand sash chain machines and operated these ineffectively until 1932. 1082

9. In 1932, The Turner & Seymour Manufacturing Company purchased the business of Smith & Egge in Bridgeport, Connecticut, which concern was a producer of sash chain, safety chain, jack chain, register chain, cable chain, ship's telegraph chain and universal chain.

10. In 1931, the total chain business of The Turner & Seymour Manufacturing Company was only $20,400.00.

11. Up to some time in 1932, The Turner & Seymour Manufacturing Company was selling its chain f.o.b. Torrington with a freight allowance up to 30¢ per 100 pounds on orders of 100 pounds or over. If the order was under 100 pounds no freight allowance was given. If the customer was located near Torrington where the freight was less than 30¢ per 100 pounds and the order was over 100 pounds, the customer would pay the freight and would be given an allowance for the actual amount of freight paid. 1083

If the customer was located at a distance where the freight was 40¢ per 100 pounds, the company would give him an allowance of 30¢ per 100 pounds if the order was for 100 pounds or over, and the customer would pay the list price plus 10¢, that is, the excess of the actual freight over the freight allowance.

12. From 1923 to 1932, Turner & Seymour, in order to sell sash chain in competition with Smith & Egge, which was located in Bridgeport, Connecticut, met any price made by
1085 Smith & Egge wherever it found the prices lower than its own price.

13. Upon purchasing Smith & Egge, The Turner & Seymour Manufacturing Company discovered that Smith & Egge had been selling sash chain f.o.b. Bridgeport but had in many cases been giving a freight allowance to meet the price of a competitor located at a distance from Bridgeport. It found that Smith & Egge had no orderly system of freight equalization but met competitor's prices wherever necessary. Examination of the records of Smith & Egge revealed that it had been losing business steadily and that it maintained warehouse stocks in various cities and paid the freight to those points and, in that manner, secured business at points where its competitors had a freight ad-
1086 vantage.

14. In 1932, when Turner & Seymour purchased Smith & Egge there were other manufacturers of sash chain in the United States as follows:

The American Chain Company in York, Pennsylvania;
Bridgeport Chain Company at Bridgeport, Connecticut;

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half of The Turner & Seymour Manufacturing Company
and The John M. Russell Manufacturing Company.

The Cleveland Chain Company and Hodell Chain Company in Cleveland, Ohio;
John M. Russell Manufacturing Company in Naugatuck, Connecticut; and
Corbin Screw Corporation in New Britain, Connecticut.

5. After purchasing Smith & Egge, Turner & Seymour
estigated the method of pricing sash and kindred chain
n in use by its competitors and discovered that its com-
itors were selling chain f.o.b. their plants but were 1088
ualizing freight with York, Pennsylvania, Bridgeport,
nnecticut, and Cleveland, Ohio. It also discovered that
list prices of its competitors for the same items were
ntical and that the list prices were shown in the cata-
ues of the various manufacturers but that the discounts
m the prices were shown in separate discount sheets.

6. Prior to purchasing Smith & Egge, Turner & Sey-
ur had a number of complaints from its salesmen that
y were unable to sell in competition with other chain
nufacturers on the 30¢ freight allowance which Turner
Seymour had been using and, in such cases, Turner &
ymour permitted its salesmen to give an additional
ight allowance wherever necessary to meet the price of
ompetitor. For example, in 1929, in order to secure the 1089
der for sash chain to be installed in the Merchandise Mart
Chicago, Turner & Seymour equalized freight with Chi-
o in which city Smith & Egge maintained a warehouse
ck.

7. In 1932, in investigating the sales methods of its
mpetitors, Turner & Seymour found that the purchasing
nts of its customers and prospective customers had be-
me accustomed to buying upon a freight equalization basis

and, for that reason, Turner & Seymour did not consider adopting any other basis.

18. After having discovered that its competitors were equalizing freight with York, Cleveland, and Bridgeport, Turner & Seymour adopted a similar practice in order to sell its chain products throughout the country on an equal footing with its competitors.

19. The change from a freight allowance to a freight equalization basis was made by Turner & Seymour in 1932
1091 without any discussion of the matter with any other chain manufacturer and was made solely to permit Turner and Seymour to compete with its competitors on an equal footing freight wise.

20. The pricing practices and methods followed by Turner & Seymour, as shown by its invoices, in the sale of its sash and kindred chains, except cable chain, laminated sprocket chain and universal chain were as follows:

(a) It charged a base price f.o.b. Torrington, Connecticut, the location of its only mill.

(b) On sales to customers in Torrington and on sales where customers picked up the chain at the mill, the base
1092 price was charged and there was no charge for transportation.

(c) On sales to customers located closer to Torrington and to Bridgeport, Connecticut, the customer paid the base price f.o.b. Torrington, plus the actual transportation charge from the mill to the point of delivery.

(d) On all shipments of 100 pounds or less, the base price f.o.b. Torrington was charged and the customer paid the

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actual transportation charge from the mill to the point of delivery.

(e) On shipments in excess of 100 pounds, where the transportation charge from Torrington to the customer's destination was greater than the transportation charge from Bridgeport, York or Cleveland and, in the case of sash and register chain, from Holland, Michigan, also (whichever city was closest freight wise to the destination of the customers involved) to the customer's destination, the customer was charged the base price f.o.b. Torrington and the transportation charge was handled in one of the following ways:

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(1) If the shipment was made f.o.b. Torrington, the customer was given a credit on the invoice with the difference between the two transportation charges.

(2) If the shipment was made freight prepaid, the transportation charge from that one of the aforementioned cities which was closest to the customer's destination was added to the base price on the invoice.

(f) On deliveries in any of the five boroughs of New York City, in Newark, in Jersey City and Hoboken there was no charge for transportation.

(g) On shipments from its warehouses in Chicago, St. Louis and Philadelphia, Turner & Seymour charged a base price f.o.b. the warehouse and granted similar allowances or made similar charges to equalize the actual transportation from Bridgeport, York, Cleveland or Holland, whichever was closest freight wise to the customer's destination.

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(h) In all cases where the minimum bill of lading charge was higher than the amount of freight equalization on the shipment involved, freight equalization was not used.

1096 *Appendix to Memorandum to the Trial Examiner Filed on Behalf of The Turner & Seymour Manufacturing Company and The John M. Russell Manufacturing Company.*

(i) In no case was any amount charged for transportation in excess of the actual cost of transportation from Torrington to the point of delivery. There was no phantom freight.

21. All sales of cable chain, laminated sprocket chain and universal chain made by Turner & Seymour were made f.o.b. Torrington and the customer paid the transportation charge without equalization or allowance.

22. Freight equalization was used only on competitive
1097 items and only where necessary to meet a competitor's price. In many cases where a customer was entitled to take freight equalization he did not take it and in such cases he paid the full transportation from Torrington to the point of destination.

23. Turner & Seymour equalizes freight with Holland, Michigan, on furnace chain by reason of the fact that furnace chain is produced in Holland, Michigan by Hart & Cooley Manufacturing Company and is in competition with the furnace chain produced by Turner & Seymour.

24. Other manufacturers delivering chain in the Metro-
1098 politan area of New York City do so without making any charge for freight and for that reason, Turner & Seymour adopted the same method in order to make sales of its sash chain in that market.

25. The cost of freight equalization is averaged over the total sales of chain manufactured by Turner & Seymour and thus becomes part of the item of "selling expense" which is taken into consideration in fixing prices to be charged for chain.

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26. In averaging freight, Turner & Seymour treats freight exactly as it does a great many other items of cost. For example, if it is manufacturing a specific order for a customer and a die breaks, requiring a new die, this is not charged against that specific customer but becomes part of the general overhead. Freight equalization is treated in exactly the same manner.

27. If the list prices and discounts of Turner & Seymour were the same as those of its competitors or if Turner & Seymour were required to sell all of its chain f.o.b. Torrington at a uniform f.o.b. price which would be the same 1100
to every customer wherever located, and was not allowed to equalize freight with any other point, it would only be able to sell chain in a circumscribed area, that is, an area which is nearer to its plant than the plant of any other competitor. Its sales to the Southeast would be limited to an area half way to New Britain, Connecticut and its sales to the Northeast would be limited to a distance of about 100 miles. Its sales to the East would be eliminated and its sales to the West would be limited to a distance of approximately half way to Cleveland, Ohio. Its sales to the Southwest would be limited to the distance of about half way to York, Pennsylvania; to the Northwest it could sell as far as Northern New York State.

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28. In the restricted area in which Turner & Seymour could sell its chain if it were not allowed to equalize freight with its competitors there is not enough volume of business in the type of chain manufactured by Turner & Seymour to keep 5% of its present chain capacity running.

29. The sash and kindred chain business makes up about 5% of the total business of Turner & Seymour Manufac-

turing Company and it has 32 employees working in chain production.

30. The Turner & Seymour Manufacturing Company was not a regular member of the Chain Institute, Inc. but was solely a member of the Sash and Kindred Chain Group of the Chain Institute.

31. The regular meetings of the Chain Institute, Inc. were held monthly and were held separate and apart from
1103 the meetings of the Sash and Kindred Chain Group.

32. At the meetings of the Chain Institute, Inc. nothing was discussed which had to do with sash and kindred chain, the type of chain which is manufactured by the Turner & Seymour Manufacturing Company.

33. The Turner & Seymour Manufacturing Company did not receive notices of the general meetings of the Chain Institute, Inc. and did not receive copies of the minutes of the general meetings of the Chain Institute, Inc. It did receive minutes of the Sash and Kindred Chain Group, which minutes are in evidence in this proceeding.

34. Turner & Seymour Manufacturing Company has
1104 never revealed any of the details of its business to the Chain Institute, Inc. and has filed no reports with the Chain Institute, Inc. except a monthly report of sales which is used solely as a basis for computing dues and as a basis of making up a composite report showing total sales of chain. It is impossible to tell the sales of any competing manufacturer from this composite report.

Appendix to Memorandum to the Trial Examiner Filed on Behalf of The Turner & Seymour Manufacturing Company and The John M. Russell Manufacturing Company. 1105

35. The Turner & Seymour Manufacturing Company has never reported figures to the Chain Institute.

36. The regular dues for membership in the Chain Institute are $200.00 per year but the dues paid by the Turner & Seymour Manufacturing Company as a member of the Sash and Kindred Chain Group were only $50.00 per year.

37. The Turner & Seymour Manufacturing Company and The John M. Russell Manufacturing Company were the only members of the Sash and Kindred Chain Group who were not regular members of the Chain Institute, Inc. 1106 Among the benefits received by The Turner & Seymour Manufacturing Company from membership in the Sash and Kindred Chain Group were the following:

Participation in co-operative advertising to promote the use of sash chain as against competing items, the adoption of sash and kindred chain specifications, the adoption of standard lengths for register chain, and an opportunity to suggest specifications for sash and kindred chain to the Federal Specifications Board in 1936-1937 when said Board requested the assistance of the Institute in drawing specifications.

38. During N.R.A. days the published prices and published discounts of each manufacturer were required to be 1107 filed with the Code Authority and became public knowledge. During these times, the published prices and published discounts were uniform and any earlier differences disappeared.

39. The use of uniform list prices makes it easy for the customer to compare prices of various manufacturers by merely applying the discounts to the list prices.

1108 *Appendix to Memorandum to the Trial Examiner Filed on Behalf of The Turner & Seymour Manufacturing Company and The John M. Russell Manufacturing Company.*

40. The use of uniform list prices makes it easier for the small chain manufacturers to compete with the large chain manufacturers.

41. The types of chain comprehended in the phrase "sash and kindred chain," with the exception of those few types of chain which are made solely by Turner & Seymour, are standard products.

42. Turner & Seymour does not have any customer who would continue to buy from it in the case of price cutting
1109 by competitors.

43. Turner & Seymour has lost customers to competitors because of the competitor's granting lower prices.

44. Turner & Seymour has no customers which it regards as its own personal customers and its competitors are constantly trying to take its customers away, in which effort they have at times been successful.

45. Turner & Seymour is constantly attempting to secure the customers of its competitors and in this effort it has at times been successful.

46. Turner & Seymour never made any price change at
1110 the request of a competitor, has never discussed the making of any price change with a competitor prior to putting such change into effect and has never made any price change conditional upon the action of a competitor.

47. Sash and kindred chain is highly competitive.

48. Turner & Seymour has never asked any competitor to raise its prices or promised to raise its own prices if

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the competitor would raise its prices on sash and kindred chain.

49. Turner & Seymour has never agreed with any chain manufacturer that it would limit its sales to any particular territory or to any particular type of chain.

50. The Turner & Seymour Manufacturing Company does not exchange price lists with its competitors.

51. The Turner & Seymour Manufacturing Company sells certain items of chain to some of its competitors and when it announces price changes it sends these competitors the announcement along with its other customers.

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52. The Turner & Seymour Manufacturing Company purchases certain types of chain from some of its competitors and it receives announcements of their price changes from them at the same time as do their other customers.

53. Every advance or reduction in the price of sash or kindred chain made by The Turner & Seymour Manufacturing Company has been due to an increase or reduction in raw materials and wages.

54. There have been times when The American Chain Company has advanced its prices for sash and kindred chain items. Thereupon, The Turner & Seymour Manufacturing Company has checked its costs and found that because of increased costs since its last prices had been put into effect it should also increase its prices and in such cases it has followed the advances made by The American Chain Company.

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1114 *Appendix to Memorandum to the Trial Examiner Filed on Behalf of The Turner & Seymour Manufacturing Company and The John M. Russell Manufacturing Company.*

55. The prices charged by The Turner & Seymour Manufacturing Company for bag chain decreased during the period from 1934 through 1941 by reason of Japanese and other competition and rose after May, 1941, when the foreign competition was eliminated.

56. The Turner & Seymour Manufacturing Company has initiated upward changes in prices without prior action on the part of The American Chain Company.

57. The Turner & Seymour Manufacturing Company has
1115 had unprofitable periods in the sale of its chain and chain products since 1932.

58. There are a number of competing products which would be used in the event that the prices of sash and kindred chain were advanced markedly.

59. There is continual competition between the manufacturers of sash and kindred chain based on quality of product, service to the customer, prompt adjustment of complaints, tensile strength of chain, type of reel, business relationships, suggestions for improvement over what the customer requests, and similar matters.

1116 60. Turner & Seymour learned of the prices charged by its competitors for sash and kindred chain through the receipt of price lists from those competitors from whom it purchases chain items, through reports made to its salesmen by customers, and from reports made to it by its sales representatives.

61. Among the competitors of The Turner & Seymour Manufacturing Company in the sale of sash and kindred

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chain are the following companies who are not parties to this proceeding:

Corbin Screw Corporation,
H. & O. Chain Company,
Hale Brothers,
Rome Brass and Copper Company, and
Mattatuck Manufacturing Company.

Each of these manufacturers uses freight equalization and has list prices which are in most cases identical with those of The Turner & Seymour Manufacturing Company. 1118

62. The Corbin Screw Corporation attended all meetings of the Sash and Kindred Chain Group of the Chain Institute, received notices of all meetings and minutes of meetings of this Group, and took part in the activities of this Group to the same extent as did the members of the Group.

63. The Corbin Screw Corporation uses freight equalization in its sales of sash chain, ladder chain and register chain and the prices charged by Corbin for these items are in most cases identical with the prices charged by The Turner & Seymour Manufacturing Company.

64. The Turner & Seymour Manufacturing Company is free to change its prices at any time although it would 1119
naturally have to be careful about raising prices because if its competitors did not also raise their prices it would lose its customers to its competitors.

65. The Turner & Seymour Manufacturing Company has never discussed the use of freight equalization with any competitor.

1120 *Appendix to Memorandum to the Trial Examiner Filed on Behalf of The Turner & Seymour Manufacturing Company and The John M. Russell Manufacturing Company.*

66. The Sash and Kindred Chain Group has held no meetings for several years and such meetings as were held in the past were held only at the request of one of the members and not at regular intervals.

67. The Turner & Seymour Manufacturing Company reserves the right to ship by the cheapest method and if a customer who is entitled to freight equalization insists on shipment by air, express, or auto truck, the shipment is made f.o.b. the plant with the customer paying the air transportation, express, or truck charge, and the customer
1121 is then allowed the difference between the railroad freight from Torrington and the nearest competitive point only.

68. In the case of shipments by water to the Pacific Coast, the only area to which Turner & Seymour ships by water, the transportation charge is equalized with Cleveland, York, or Bridgeport, by the same method of transportation.

69. Turner and Seymour has purchased lock link chain, friction chain, and wire sprocket chain from The American Chain Company as an accommodation to its customers. However, it intends to produce these items itself if it finds that the volume warrants the expense of new equipment.

1122 70. Within the past few years a number of new manufacturers have come into the sash and kindred chain field, including Hart & Cooley in Holland, Michigan, and Rome Brass and Copper Company in Rome, New York.

71. "Bag chain" is no. 18 sash chain packed in bags.

72. No representative of the Federal Trade Commission has ever called upon The Turner & Seymour Manfacturing

Appendix to Memorandum to the Trial Examiner Filed on Behalf of The Turner & Seymour Manufacturing Company and The John M. Russell Manufacturing Company. 1123

Company and no notice was given to The Turner & Seymour Company of the intention of the Commission to bring this proceeding nor was any opportunity given to the Company to explain its membership in the Sash and Kindred Chain Division of the Institute prior to the issuance of the complaint herein.

73. The International Chain Company of which Mr. George Campbell was President does not manufacture and never did manufacture any products which are competitive with the products made by The Turner & Seymour Manufacturing Company. 1124

74. In no case has The Turner & Seymour Manufacturing Company ever charged more freight on a shipment than which it actually had to pay.

75. In no case has The Turner & Seymour Manufacturing Company ever absorbed freight on the sale of its sash and kindred chain products except when necessary to meet the price of a competitor.

76. The Turner & Seymour Manufacturing Company does not have and never has had "channels of distribution" nor has it had nor does it now have any "jobber sales agreements". 1125

77. The Turner & Seymour Manufacturing Company has never had any business relationships of any kind with Alfred P. Shirley, Floyd B. Olcott, or Forrest C. Nichols or with the firm of Shirley, Olcott & Nichols.

78. The Turner & Seymour Manufacturing Company adopted and maintains "freight equalization" in the sale

of its products in order to meet competition and not as a result of any agreement, understanding, or conspiracy.

79. The Turner & Seymour Manufacturing Company has not conspired, agreed, planned, or acted in concert with any of the other respondents in this case to maintain fixed prices for its sash and kindred chain products.

II

1127 AS TO THE JOHN M. RUSSELL MANUFACTURING COMPANY, INC.

1. The John M. Russell Manufacturing Company, Inc. is a Connecticut corporation having a single manufacturing plant located near Naugatuck, Connecticut.

2. Said corporation is a very small company with manufacturing space approximately 40 feet by 100 feet.

3. Said corporation manufactures only sash chain, safety chain, jack chain and a single size of sprocket chain and register chain.

4. All of said chains are comprehended within the de-
1128 scription, "Sash and Kindred Chain".

5. The John M. Russell Manufacturing Company, Inc., in addition to its manufacture of sash and kindred chain, manufactures a line of plumbing supplies, buckles, fasteners, and a large number of other small metal products.

6. The John M. Russell Manufacturing Company, Inc. has only 38 employees of which 20 are engaged part-time in the manufacture of sash and kindred chain.

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7. Said corporation sells its chain through manufacturer's agents or commission men and has a single salesman, its President, who also sells its other products.

8. The company maintains no warehouse stocks and is a very small producer of sash and kindred chain.

9. From approximately 1921 to the advent of the N.R.A., said corporation sold its chain f.o.b. Naugatuck and gave a freight allowance wherever necessary to meet the price of another manufacturer.

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10. This freight allowance was up to 30¢ per 100 lbs. on shipments of 100 lbs. or over but whenever this resulted in a price higher than a competitor's price, an additional allowance was given to enable the John M. Russell Manufacturing Company, Inc. to meet the competitor's price.

11. During the period from 1921 to the advent of N.R.A. said corporation had the following competitors in its types of chain: The Turner & Seymour Manufacturing Company, Torrington, Connecticut; The American Chain & Cable Company, York, Pennsylvania; The Bridgeport Chain & Manufacturing Company, Bridgeport, Connecticut; The Mattatuck Manufacturing Company, Waterbury, Connecticut; Hale Brothers, Worcester, Massachusetts; The Chain Products Company, Cleveland, Ohio; and H & O Chain Company, Norwalk, Connecticut. 1131

12. Throughout said period the John M. Russell Manufacturing Company, Inc. was attempting to sell its chain throughout the United States but its sales were small.

13. With the coming of N.R.A. and the filing of prices, the John M. Russell Manufacturing Company, Inc. learned

of the pricing system which was being used by said competitors, i.e. selling f.o.b. factory but equalizing freight with Bridgeport, York or Cleveland.

14. The John M. Russell Manufacturing Company, Inc. determined that it could best promote country-wide sales of its own chain products by selling on the same system, i.e. f.o.b. Naugatuck with freight equalized with Bridgeport, York or Cleveland.

15. Accordingly, The John M. Russell Manufacturing
1133 Company, Inc. put out a price list on September 1, 1933, containing this method of freight equalization. This was the first price list put out by said company using such pricing system.

16. The use of freight equalization was not suggested to the John M. Russell Manufacturing Company, Inc. by any other manufacturer but was adopted by said company independently in the belief that it would enable it to sell its chain in competition with other manufacturers on a nation-wide basis.

17. In no case has The John M. Russell Manufacturing Company charged more for freight on a shipment than
1134 the freight which it actually had to pay.

18. The John M. Russell Manufacturing Company was so small that all of its billing was handled by one person who made out all of its invoices.

19. The John M. Russell Manufacturing Company could not afford a freight rate service and could not obtain locally the information needed to equalize freight on its invoices.

ppendix to Memorandum to the Trial Examiner Filed on 1135
ehalf of The Turner & Seymour Manufacturing Company and The John M. Russell Manufacturing Company.

20. Accordingly, The John M. Russell Manfacturing ompany did not indicate any figure for freight equalization on its invoices but left it up to the customer to compute and take his own freight equalization. In some cases e customers took such equalization, in other cases they d not.

21. In the case of sales made by the Chicago sales representative of The John M. Russell Manufacturing Company, this representative would indicate on the orders the nount of freight to be charged and the Company used the 1136
gures so furnished on its invoices.

22. The Company never possessed or used the "Donley" eight rate book.

23. The Company has no cost accounting system and has minimum fixed profit on any item, but just tries to make profit over-all.

24. The prices charged by The John M. Russell Manufacturing Company are not dictated by any of its competitors.

25. The John M. Russell Manufacturing Company has, general, followed the prices granted by The American 1137
ain Company on similar items although its increases ve always lagged behind those of American and its ices have at times been lower.

26. The John M. Russell Manufacturing Company buys niversal Chain from The Turner & Seymour Manufacturg Company, buys "Lock Link" chain from The American ain Company, buys sprocket chain from The Bridgeport ain Company and buys double jack chain in the sizes

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which it does not manufacture from the Hodell Chain Company in order to fill orders of its customers. Accordingly, it receives announcements of price changes from these companies.

27. The John M. Russell Manufacturing Company also learns of price changes made by its competitors from its sales representatives and its customers.

28. The John M. Russell Manufacturing Company does not exchange price lists with its competitors, although it
1139 does send notices of its price changes to those competitors to whom it sells chain items. Such notices are sent only at the same time that announcement is made to the trade generally.

29. The types of chain manufactured by The John M. Russell Manufacturing Company are standard items and could not be sold by it at a higher delivered cost than similar items manufactured by its competitors.

30. Unless The John M. Russell Manufacturing Company equalized freight on its competing chain items with competitors located nearer to the customer than its own factory, its market would be limited to the area in which
1140 it had a freight advantage over its competitors.

31. The John M. Russell Manufacturing Company is so small that it must be a follower and not a leader in the sash and kindred chain business.

32. The use of uniform list prices makes it much easier for The John M. Russell Manufacturing Company to sell in competition with larger manufacturers of sash and kindred chain.

Appendix to Memorandum to the Trial Examiner Filed on Behalf of The Turner & Seymour Manufacturing Company and The John M. Russell Manufacturing Company. 1141

33. The John M. Russell Manufacturing Company now does a greater percentage of the total sash and kindred chain business in the United States than it did in 1932.

34. The John M. Russell Manufacturing Company joined the Chain Institute, as a member of the Sash Chain Division only, in 1933 in order to better cooperate under the N.R.A. and in order that it might thus receive the same information as the larger companies.

35. Among the reasons for The John M. Russell Manufacturing Company retaining its membership in the Sash Chain Division after the N.R.A. was held unconstitutional were that it seemed to be the best way to make a united effort to combat Japanese and German competition in #8 sash chain by obtaining a protective tariff; by reason of the standardization work which was done, involving the elimination of many odd lengths and sizes; and because it furnished a way to do cooperative advertising in favor of sash chain as against substitutes therefor. 1142

36. The total expenses of such membership including dues of $50.00 per year and assessment on its sales was less than $100.00 per year.

37. The John M. Russell Manufacturing Company, through its membership in the Sash Chain Division cooperated with other manufacturers in placing an advertisement in "Sweet's Catalogue" promoting the sale of sash chain, something which it could not have done with its own small resources. 1143

38. The John M. Russell Manufacturing Company resigned from the Sash Chain Division of the Chain Institute in 1943 after institution of these proceedings.

1144 *Appendix to Memorandum to the Trial Examiner Filed on Behalf of The Turner & Seymour Manufacturing Company and The John M. Russell Manufacturing Company.*

39. The Sash and Kindred Chain Group held meetings separate and apart from the Chain Institute meetings and from the meetings of the Weldless Chain Division; these meetings were held infrequently and were generally held on the same day or on one of the days when the Chain Institute was holding its meeting, after their meeting had concluded. Such meetings were, however, held much less frequently than the meetings of the Chain Institute and no such meetings have been held for several years.

1145 40. At these meetings, among other matters, cooperative advertising to promote the use of sash chain, the best method of meeting foreign competition, labor policies and the general state of business were discussed.

41. At no meeting of the Sash and Kindred Chain Group did any competitor ever announce that it intended to increase or decrease his prices.

42. At no meeting of the Sash and Kindred Chain Group did The John M. Russell Manufacturing Company tell any competitor that it was going to increase or decrease its prices.

1146 43. The John M. Russell Manufacturing Company never received notices of the meetings of the Chain Institute and never received copies of the minutes of the meetings of the Chain Institute.

44. The Corbin Screw Company, New Britain, Connecticut was almost always represented at meetings of the Sash and Kindred Group, rendered reports of its sales to the Institute and received composite reports of total sales of sash and kindred chain just as did the members of the group.

Appendix to Memorandum to the Trial Examiner Filed on Behalf of The Turner & Seymour Manufacturing Company and The John M. Russell Manufacturing Company. 1147

45. The John M. Russell Manufacturing Company has never revealed any of the details of its business to the Chain Institute. During N.R.A. days it filed its price lists as required by law but since N.R.A. it has filed no reports whatever with the Chain Institute except a monthly report of sales which is used solely as a basis for computing dues and as a basis for making up a composite report showing total sales of chain.

46. The John M. Russell Manufacturing Company has never reported any cost figures to the Chain Institute. 1148

47. The John M. Russell Manufacturing Company does not have any "channels of distribution" and has no jobbers sales agreements.

48. The John M. Russell Manufacturing Company has the following competitors in the manufacture and sale of sash and kindred chain who are not parties to this proceeding: Rome Brass and Copper Company; Mattatuck Manufacturing Company; Corbin Screw Company; H & O Chain Company; Hale Brothers; and each of these manufacturers uses and has used freight equalization and has list prices which are in most cases identical with those of The John M. Russell Manufacturing Company.

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49. The John M. Russell Manufacturing Company has never made any price change at the request of a competitor, has never discussed the making of any price change with a competitor prior to putting such change into effect, and has never made any price change conditional upon the action of a competitor.

50. There have been times during the period covered by the Amended Complaint herein when The John M.

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Russell Manufacturing Company has sold its chain products at a loss.

51. The John M. Russell Manufacturing Company has never had any business relations of any kind with Alfred P. Shirley, Floyd C. Olcott or Forrest C. Nichols or with the firm of Shirley, Olcott and Nichols.

52. No representative of the Federal Trade Commission has ever called upon The John M. Russell Manufacturing Company and no notice was given to The John M. Russell
1151 Manufacturing Company of the intention of the Commission to bring this proceeding nor was any opportunity given to the company to explain its membership in the Sash Chain Division of the Institute prior to the institution of this proceeding.

III.

Proposed Conclusions of Law as to Both The Turner & Seymour Manufacturing Company and The John M. Russell Manufacturing Company.

COUNT I.

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(a) The aforesaid acts and practices of the respondents, under the conditions and circumstances set forth, do not constitute unfair methods of competition in commerce within the intent or meaning of Section 5 of the Federal Trade Commission Act.

Section 5 of the Federal Trade Commission Act and do not constitute unfair or

Appendix to Memorandum to the Trial Examiner Filed on Behalf of The Turner & Seymour Manufacturing Company and The John M. Russell Manufacturing Company. 1153

COUNT II.

(a) Any difference between the delivered price paid by any buyer of sash and kindred chain to either of these respondent manufacturers thereof and the delivered price paid to such manufacturer by any other buyer thereof in any other location, is (insofar as such difference is caused by such manufacturer's use of the "freight equalization" method of selling) the result merely of the difference in freight cost resulting from the differing distances of such buyers from a factory or factories at which sash and 1154
kindred chain is manufactured and sold.

(b) Insofar as the "freight equalization" method of selling sash and kindred chain resulted in either of these respondent manufacturers charging a lower delivered price to a customer located at a distance from such manufacturer's plant than to a customer located nearer to such manufacturer's plant, such lower delivered price was always made in good faith to meet an equally low delivered price of a competitor of such manufacturer, which lower delivered price of such competitor was, in all instances, the sum of such competitor's price f.o.b. its factory, less whatever discounts the corporation allowed, plus the freight from such factory to the customer concerned.

(c) There is no evidence in the record as to the com- 1155
petitive relationship, if any, between any buyer of sash and kindred chain from either of these respondent manufacturers and any other buyer of sash and kindred chain from such respondent manufacturer.

(d) There is no evidence in the record that any buyer of sash and kindred chain from either of these respondent manufacturers paid a higher or lower price therefor

1156 than any other buyer thereof from such respondent manufacturers who were in competition with the first such buyer.

(e) The respondent manufacturers that sell sash and kindred chains are in competition with each other. There is no evidence that the "freight equalization" method of selling sash and kindred chain has lessened competition between or among the respondent manufacturers. The evidence, on the contrary, shows that the use of this method of selling has permitted the respondent manufacturers to
1157 compete with each other throughout the United States and that there has been vigorous competition, in price and otherwise, among the respondent manufacturers, in the sale of sash and kindred chain, during the entire period covered by the amended complaint.

(f) There is no evidence showing that either of these respondent manufacturers has established any discount classifications, or has given any discounts, which cause, or have caused, any customer of such respondent manufacturer to pay a higher or a lower price for any chain or chain product than any other customer of that same respondent manufacturer who is in competition with the first such customer.

1158 (g) There is no evidence as to the competitive relationship, if any, between any buyer of any type of chain or chain product from either of these respondent manufacturers and any other buyer of such chain or chain product from the same respondent manufacturer.

(h) The use of the "freight equalization" method of selling sash and kindred chain by each of these individual manufacturers and sellers of sash and kindred chain has not had, and does not have, any reasonable possibility of sub-

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stantially lessening competition or tending to create a monopoly in any line of commerce, or of injuring, destroying or preventing competition with any person.

(i) None of the aforesaid acts or practices of either of these two respondent manufacturers of sash and kindred chain has constituted or resulted in any discrimination in price in violation of the provisions of Section 2(a) of the Clayton Act, as amended.

PROPOSED ORDER

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On the basis of the foregoing proposed Findings of Fact and Conclusions, these two respondents, The Turner & Seymour Manufacturing Company and The John M. Russell Manufacturing Company, respectfully propose and urge that the Trial Examiner recommend that the Commission issue an order in this proceeding, in customary form, dismissing the amended complaint in its entirety as to these two respondents and each of them.

Filed May 20, 1948.

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Proposed Findings of Fact and Conclusions Submitted on Behalf of Respondent Columbus McKinnon Chain Corporation.

1. Respondent, Columbus McKinnon Chain Corporation (hereinafter referred to as "Columbus McKinnon") is a corporation organized and existing under the Laws of the State of New York, with its principal office and place of business located at Tonawanda, New York and plant at the same location.

2. Columbus McKinnon has been a member of the Chain Institute since June 1933, and has attended its meetings (R. 602).

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3. During the period covered by the Amended Complaint, Columbus McKinnon manufactured welded chain and tire chains.

4. Columbus McKinnon has never manufactured weldless chain, but purchases small amounts from competitors for resale to its customers as an accommodation (Respondent's Exhibit 5).

5. Columbus McKinnon manufactures its own patented tire chain known as the "Claw" tire chain, which it has always sold and now sells at its own published prices which are different from the tire chain prices of any other respondent (Commission's Exhibit 1635).

1164

6. Columbus McKinnon did not sign the main stipulation and is not bound by any of the facts set forth therein. It merely stipulated that if duly appointed representatives of those of the respondents who did sign the stipulation were called as witnesses they would testify to the same effect as the language that appears in the stipulation *with the exception* of paragraph eight thereof, which reads as follows:

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"With respect to the type or types of chain it manufactures and/or sells, each Respondent Member, *with the knowledge that other Respondent Members simultaneously do likewise,* uses the applicable basing point, multiple basing point, and/or delivered pricing practices and methods, hereinafter more fully described in Paragraphs Nine, Ten and Eleven hereof."

AND except its right to object to evidence, which objections were waived by other respondents in the last paragraph in the main stipulation (Commission's Exhibit 1267).

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7. Columbus McKinnon in the sale of weldless chain did not use the so-called "freight equalization" method of selling, but sold small amounts of weldless chain f.o.b. its plant at Tonawanda, New York (Respondent's Exhibit 5).

8. Columbus McKinnon never used any commercial freight service in connection with its sales of weldless chain (Respondent's Exhibit 5).

9. Columbus McKinnon did not sell any of its products at prices or by methods which were the result of any agreement, conspiracy or concerted action but acted independently of all other respondents in fixing its prices and in the sale of its products.

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10. Columbus McKinnon did not adopt or use the "Universal Delivered Price" method of selling tire chains as the result of any agreement or concerted action.

11. Columbus McKinnon in the adoption and use of the so-called "Pittsburgh Plus" method of selling welded chain acted entirely independently and without discussion with any other respondent.

1168 *Proposed Findings of Fact and Conclusions Submitted on Behalf of Respondent Columbus McKinnon Chain Corporation.*

12. Columbus McKinnon in the adoption and use of the "Delivered Price" method of selling tire chains acted entirely independently and without discussion with any other respondent.

13. Columbus McKinnon did not sign the stipulation relating to invoices appearing at pages 871-8 of the Record and is not bound by any of the facts contained in said stipulation.

1169 14. Columbus McKinnon was not a member of the American Patent License Group on bar reinforced tire chains and had nothing whatsoever to do with the arrangement as described in Paragraph 6 of the amended complaint.

15. Columbus McKinnon was not a member of the Shirley, Olcott & Nichols Group, and had nothing whatsoever to do with the arrangement to sell tire chains to the Federal Government as described in Paragraph 7 of the amended complaint.

16. The so-called "Campbell" letters are not in any way binding on Columbus McKinnon, and are hearsay and not the "substantial" evidence necessary to support any finding of agreement or collusion. Furthermore, there is noth-
1170 ing in any of the "Campbell" letters to support even inferentially any charge that Columbus McKinnon adopted or used any pricing method by understanding, combination or agreement, but on the contrary would support a finding that Columbus McKinnon acted independently of all others.

17. There is no evidence, either direct or circumstantial that Columbus McKinnon ever discussed prices, past, present or future, at Institute meetings or at any other time or place.

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18. Columbus McKinnon did not follow any plan of price leadership in the preparation or promulgation of its published price lists as to tire chains.

19. Columbus McKinnon did not use the Donnelly Freight Rate Book in its sales of welded chain or weldless chain.

20. Any exchange of price lists by Columbus McKinnon with any competitor was for the sole reason that they were each others customers and purchased certain items of welded or weldless chain from each other from time to time.

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21. Columbus McKinnon did not use any of the pricing methods in its sale of chains "with the knowledge that other respondents did likewise" (Commission's Exhibit 1267).

22. There is no evidence that any similarity of price which may have existed at times between the prices of Columbus McKinnon and other respondents was occasioned by any agreement or understanding.

23. Dennis A. Merriman was employed as Managing Director of the Chain Institute to fulfill only the normal functions of a managing executive of a trade association to replace his predecessor, Irving S. Paull, when he died (R. 2089-90).

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1174 *Proposed Findings of Fact and Conclusions Submitted on Behalf of Respondent Columbus McKinnon Chain Corporation.*

CONCLUSIONS

24. Columbus McKinnon has, at all times during the period covered by the Amended Complaint, been engaged in vigorous competition in price and otherwise with the other respondents.

25. Columbus McKinnon has not entered into, engaged in or carried out any understanding, agreement, combination, conspiracy or planned common course of action in fixing the selling prices of its chain products and in the sale of
1175 its chain products.

26. Columbus McKinnon, acting either individually or through the respondent Institute or any other respondent, has not entered into, engaged in, or carried out any understanding, agreement, combination, conspiracy or planned common course of action to fix prices or to restrain competition in price or otherwise in the sale of any chain or chain products in violation of Section 5 of the Federal Trade Commission Act.

27. The prices at which Columbus McKinnon sells welded and tire chains has not eliminated or lessened price or other competition among the respondents or any other
1176 persons, firms or corporations.

28. The sale of welded and tire chains at prices fixed by Columbus McKinnon has not had and does not have the effect of eliminating or substantially lessening competition, or tending to create a monopoly, or of injuring, destroying or preventing competition with any other person or persons, or of maintaining unfair and oppressive discrimination against purchasers of chain and chain products.

Proposed Findings of Fact and Conclusions Submitted on Behalf of Respondent Columbus McKinnon Chain Corporation. 1177

29. Columbus McKinnon has not violated the provisions of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act.

Upon the foregoing proposed Findings of Fact and Conclusions, respondent, Columbus McKinnon Chain Corporation, respectfully submits and requests that the Examiner recommend that an order issue dismissing the Amended Complaint as to it in its entirety.

Filed May 20, 1948.

1178

Trial Examiner's Recommended Decision.

Part I.

Preliminary Statement

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on December 22, 1942, issued its complaint in this proceeding naming as respondents therein the persons, firms and corporations named in the caption hereof, charging them, and each of them, with having, for more than eight years theretofore, conspired to fix and maintain identical delivered prices for chain products in violation of Section 5 of the Federal Trade Commission Act. 1179

Thereafter and on October 9, 1945, an amended complaint issued containing two counts, the first count charging said respondents, and each of them, with substantially the same violations of the Federal Trade Commission Act, as amended by the Wheeler-Lea Act of March 21, 1938, and the second count charging price discriminations in viola-

1180 *Trial Examiner's Recommended Decision.*

tion of the provisions of subsection (a) of Section 2 of the Clayton Act as amended by the Robinson Patman Act. Service being made all respondents, except Walter S. McCann, deceased (R. 593), answered.

Issues joined, the pleadings were referred to the undersigned, a duly commissioned Trial Examiner, for appropriate action under Rule XIV of the Rules of Practice.

Hearings were thereafter held and the record was closed August 25, 1948. The transcript of the testimony, together with all exhibits received in evidence, was filed in the office of the Commission.

1181

THE PLEADINGS

The Amended Complaint: The amended complaint is quite lengthy (approximately 10,000 words). It is in two counts, the essence only of each count being here stated.

Jurisdictional Averments: Both counts contain all essential jurisdictional averments factually pleaded—the correct name of each respondent; the state law under which each corporate respondent was organized; the business each respondent was engaged in; the location of the principal office of each respondent; public interest; interstate commerce; and competition.

1182 *Count 1* then charges

That eighteen of the respondents (those listed in the caption hereof opposite numbers 2 thru 19, and hereinafter referred to as "*members*") produce, sell and distribute practically all chain products, including *welded*, *weldless* and *tire chains* and parts thereof, sold in the United States, and that for more than eight years theretofore said respondents combined and conspired to restrain trade or commerce between and

among the several states of the United States and the District of Columbia in said chain products, by fixing and maintaining uniform prices for said products, thereby hindering, frustrating, suppressing and eliminating price competition in the manufacture, sale and distribution of said products in commerce.

That for the more effective execution of said conspiracy said respondent members employed the following respondent corporate device and individual agencies: They (1) organized the respondent Chain Institute, Inc. (hereinafter referred to as the *"Institute"*), an incorporated trade association with officers, directors and agents, and enrolled as members thereof; (2) 1184
regularly employed, since sometime in 1938, respondent Merriman; and (3) on certain occasions employed respondents Shirley, Olcott and Nichols as agents.

That respondent Institute has been and is used to promote and serve the mutual interests of the respondent members and as an instrument or vehicle for their joint and cooperative price fixing purposes.

That respondent members acting directly between and among themselves and through and by means of respondent Institute, its directors, officers, agents, and respondent Merriman, and on occasions through and by means of respondents Shirley, Olcott and Nichols, in furtherance of said conspiracy have agreed to and 1185
adopted——

(1) price fixing formulae whereby identical delivered price quotations and identical delivered costs for the sale of chain and chain products were and are fixed and maintained;

(2) a price leadership plan by which respondent members adopt and use as their respective price lists, the price lists, as and when issued, of the respond-

ent American Chain & Cable Company, Inc. (hereinafter referred to as "*American*"), the leading chain producer and manufacturer in the industry, showing price increases and decreases, resulting in uniform base prices of all members irrespective of differences in cost of materials used or in cost of manufacture;

(3) a schedule or compilation of common pricing factors, designated "freight rate" factors which was not and is not intended for determining freight rates, but is used in determining prices;

1187 (4) uniform "basing point", "freight equalization" and "zone" pricing systems resulting in uniform delivered prices irrespective of the distance from the mill to the point of delivery (for explanation of each system see Pars. 9, 10 and 11);

(5) uniform discount methods;

(6) "jobber sales" and "dealer" agreements, pursuant to which the jobbers and dealers of the respective members are required to maintain in their resale of chain and chain products the resale prices prescribed by said members;

(7) a classification of chain and chain products for the purpose of establishing arbitrary customer "channels of distribution" through particular types of middlemen and arbitrary levels of discounts for each class of customer:

1188

(8) the employment of respondent Merriman as a common agent for all members;

(9) the exchange of information, either directly or through the respondent Institute, pertaining to prospective customers, prices paid and volume of business of such prospective customers;

(10) the exchange of information concerning quoted and future prices;

(11) the holding of meetings by respondent members at the respondent Institute, from time to time, at which respondent Merriman and the officers and agents of the Institute discussed "past, current and future prices and price quotations with various respondent members and advise, instruct and press them with regard to what price quotations should be made on chain and chain products";

(12) the issuance of purported licenses under which prices were fixed (for explanation see par. 6); 1196

(13) the fraudulent procurement from U. S. Government officers of specifications for tire chains for the purpose of eliminating competitors (for explanation see Par. 5, subpars. (14) and (17));

(14) the submission by certain of the respondents of deceptive noncompetitive bids for supplies sought by the United States Government (for explanation see Par. 7).

which said acts and practices it is charged are to the prejudice of the public; have a dangerous tendency to and have actually hindered, suppressed and eliminated competition in said products in commerce and are in violation of Section 5 of the Federal Trade Commission Act. 1191

Count 2, after alleging the jurisdictional averments hereinbefore referred to, charges—

That the eighteen respondent members (Nos. 2 thru 19) since June 19, 1936, have discriminated in prices charged purchasers of "chain and chain products" of like grade and quality by systematically sell-

ing said products to many purchasers at a price higher than the price at which products of like grade and quality are sold to other purchasers and users; that each respondent member sells at delivered prices and uses a common pricing system, resulting in different net prices received by the manufacturers; that each respondent member engaged in the sale of *welded* chain and *welded* chain products uses an arbitrary base price, f.o.b. Pittsburgh, plus freight charges from that point to destination, although shipments are regularly made from other locations (the points of production) from which different freight charges actually
1193 apply; that each of the respondent members engaged in the sale of *weldless* chains and *weldless* chain products uses an arbitrary base price, f.o.b., of a number of base points, plus charges for freight from such base points as though the shipments were made therefrom to each of the various destinations, when in fact in many instances the shipments are not made from said base points, but from different production points from which different freight charges actually apply; that each of said respondents has classified its customers and has accorded to certain classes quantity, trade, regional and other discounts denied other classes.

that the effect of said acts may be to substantially lessen competition, tend toward monopoly, and were and are in
1194 violation of the provisions of subsection (a) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

Respondents' Answers: Joint answers were filed by (1) respondents The Bridgeport Chain & Manufacturing Company, Cleveland Chain & Manufacturing Company, Round California Chain Company and Seattle Chain & Mfg. Company; (2) respondents Shirley, Olcott and Nichols; and

3) respondents American Chain & Cable Company, Inc., nd Wm. D. Kirkpatrick. All other respondents filed sepa- ate answers.

All answers admit the jurisdictional averments herein- efore summarized, except public interest which is denied.

As to Count 1, the answers of all the respondents deny he existence at any time of any agreement or understand- ng, express or implied, to fix uniform prices for welded, eldless or tire chains, and aver that the existence, at times, f substantially uniform delivered prices was due to eco- omic conditions and lawful trade practices common to the hain and other industries. 1196

As to Count 2, all respondents deny unlawful discrimi- ation in price.

PENDING MOTIONS

Four motions on behalf of eleven of the respondents were led with the Commission before the pleadings were re- erred to the Examiner and were by the Commission "*denied ithout prejudice to renewal at the time of final hearing.*"

Thereafter said motions were renewed and ten additional notions on behalf of one or more, but collectively embrac- ng all respondents, were filed with the Commission and ll of the fourteen motions were referred to the Examiner or recommendation. 1197

It was agreed by the Examiner and counsel that as and when said motions were referred to the Examiner under Rule X for recommendation, they would be by the Examiner taken under advisement and disposed of at the conclusion of the case in his Recommended Decision, of which action the Commission was advised in the Examiner's Reports dated October 23 and November 10, 1947.

All of the fourteen motions fall within one of six classes and to avoid descriptive repetition the subject matter of each motion is here indicated by a designating letter opposite the description of each type.

1. *Subject Matter*:

A. To dismiss the amended complaint.

B. To sever and dismiss Paragraphs Six and Seven and all related matter in subparagraphs of Paragraph Five—pertaining to American Chain & Cable Company's reinforced tire chain patent licenses.

1199 C. To sever and dismiss Paragraph Seven and all related matter in subparagraphs of Paragraph Five—pertaining to the Shirley, Olcott and Nichols arrangement.

D. To sever and dismiss charges relating to the use of the "Pittsburgh-plus" method of selling welded chain.

E. To sever and dismiss charges relating to the use of the universal delivered price method of selling tire chain.

F. To strike certain exhibits as not having properly been admitted in evidence with respect to the moving respondent.

1200 2. *The Individual Motions*:

The various motions are here listed in the order of filing, the subject matter of each motion being indicated by the designating letter or letters in parentheses as above described.

1. Filed October 30, 1945, by Russell. Denied by order dated May 23, 1946, without prejudice. Renewed February 20, 1948 (A).

2. Filed November 30, 1945, by Nixdorff-Krein, Peerless, Western, Woodhouse, and Merriman. Denied May 23, 1946, without prejudice. Renewed October 16, 1947, and renewed again February 20, 1948 (B, C).

3. Filed March 13, 1946, by Turner & Seymour. Denied May 23, 1946, without prejudice. Renewed February 20, 1948 (B, C, D, E).

4. Filed April 11, 1946, by Cleveland, Bridgeport, Round California, Seattle. Denied May 23, 1946, without prejudice. Renewed October 16, 1947, and renewed again February 20, 1948 (B, C).

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5. Filed September 30, 1947, by Turner & Seymour. Renewed February 20, 1948 (A, B, C, D, E).

6. Filed September 30, 1947, by Russell. Renewed February 20, 1948 (A, B, C, D, E).

7. Filed September 30, 1947, by Columbus McKinnon. Renewed February 9, 1948 (A, B, C, F).

8. Filed October 16, 1947, by Cleveland, Bridgeport, Round California, Seattle, International, Nixdorff-Krein, Peerless, Western, Woodhouse, Merriman, Campbell, Chain Institute. Renewed February 20, 1948 (B, C).

9. Filed October 16, 1947, by American, Cleveland, Bridgport, Round California, Seattle, Woodhouse, Hodell, International, McKay, Nixdorff-Krein, Peerless, Pyrene, St. Pierre, Taylor, Western, Kirkpatrick, Bond, Campbell, Shirley, Olcott, Nichols, Merriman, Chain Institute. Renewed February 20, 1948 (A).

1203

10. Filed November 6, 1947, by Shirley, Olcott and Nichols. Renewed February 20, 1948 (B).

11. Filed November 6, 1947, by American, McKay, Hodell, Pyrene, St. Pierre, Taylor, Kirkpatrick, Bond. Renewed February 20, 1948 (B).

12. Filed February 9, 1948, by Columbus McKinnon. Renewed previous motion of September 30, 1947 (No. 7 above).

13. Filed February 9, 1948, by American, McKay, Hodell, Pyrene, St. Pierre, Taylor, Bond, Kirkpatrick. Renewed February 20, 1948 (C).

14. Filed February 20, 1948, by all respondents except Columbus McKinnon. Renewing a number of prior motions as indicated above.

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RECOMMENDED DISPOSITION OF MOTIONS

Eleven of the fourteen motions hereinbefore listed (Nos. 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, and 13) in whole or in part are for severance and dismissal of Paragraphs Six or Seven or Six and Seven and all related matter set forth in subparagraphs of Paragraph Five of Count 1, indicated by the designating letters "B" and "C".

The disposition of these motions will, in the opinion of the Examiner, remove stale issues therein raised, unrelated, or at best remotely related, to the overall issue and which only tend to obscure or befog the main issue to be hereinafter considered. The facts upon which the motions are predicated have been largely stipulated and those not stipulated appear clear on the record which dispenses with the necessity of any advance review of the evidence.

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STATEMENT OF STALE AND UNRELATED ISSUES IN COUNT 1:

Count 1 of the complaint charges an overall conspiracy to "hinder, frustrate, suppress and eliminate competition in the manufacture, sale and distribution of *welded, weldless* and *tire* chains and chain products in commerce" [1] on the part of all of the respondents, eighteen of whom, it is alleged [2] and admitted,[3] manufacture, sell and distribute practically all of the welded, weldless and tire chains produced in the United States; the objective of the conspiracy being effected by the common use of a price fixing formula by which identical delivered price quotations, terms and conditions of sale for chain and chain products in the United 1208
States are fixed and maintained.[4] Paragraphs Six and Seven and related matter in Paragraph Five of Count 1 relate exclusively to other and different acts and practices on the part of six of the eighteen manufacturing respondents—American, McKay, Hodell, Pyrene, St. Pierre and Taylor and their agents, respondents Shirley, Olcott and Nichols—with which the remaining 12 manufacturing respondents were in no wise connected, and which culminated in the acts and practices alleged in subparagraph 17 of Paragraph Five and which acts and practices it is alleged were for "the purpose" and had "the effect" *of aiding respondents* (meaning American, McKay, Hodell, Pyrene, St. Pierre and Taylor) "in *eliminating certain competitors*" (having reference specifically to the other ten respondents who manufactured and sold or merely sold substantially all 1209
tire chains not sold by the six named respondents) "and their price competition in the *submission of bids on tire chains to the* Federal Government." Paragraphs Six and

[1] Comp. subpar. 1 of Par. Five.

[2] Comp. subpar. 7 of Par Four.

[3] Stip. R. 611, 635, 643.

[4] Comp. subpars. (4) and (5) of Par. Five.

Seven of Count 1 relate exclusively to tire chains which are attached around the wheels of motorized equipment, including automobiles, trucks and farm tractors.[3] It is at Paragraphs Six and Seven and related matter appearing in Paragraph Five, Count 1, which relate to other and different acts and practices than those charged in the overall conspiracy, at which all of said motions are leveled.

FINDINGS OF FACT ON MATTERS EMBRACED IN MOTIONS:

The related facts disclosed by the evidence conform to the allegations of the complaint in the previous stated
1211 respects and are in substance:

PARAGRAPH ONE: Twelve of the manufacturing respondents—American Chain & Cable Company, Inc. (hereinafter referred to as "*American*"), Cleveland Chain & Manufacturing Company (hereinafter referred to as "*Cleveland*"), Columbus McKinnon Chain Corporation (hereinafter referred to as "*Columbus McKinnon*"), Hodell Chain Company (hereinafter referred to as "*Hodell*"), International Chain & Manufacturing Company (hereinafter referred to as "*International*"), The McKay Company (hereinafter referred to as "*McKay*"), Nixdorff-Krein Manufacturing Company (hereinafter referred to as "*Nixdorff*"), Peerless Chain Company (hereinafter referred to as "*Peerless*"),
1212 Pyrene Manufacturing Company (hereinafter referred to as "*Pyrene*"), St. Pierre Chain Corporation (hereinafter referred to as "*St. Pierre*"), S. G. Taylor Chain Company (hereinafter referred to as "*Taylor*"), and Western Chain Products Company (hereinafter referred to as "*Western*") —manufacture and sell tire chains; four—The Bridgeport Chain & Manufacturing Company (hereinafter referred to as "*Bridgeport*"), Round California Chain Company (here-

[3] Stip. R. 610-11. 635. 643. 719-20.

inafter referred to as *"Round California"*), Seattle Chain & Mfg. Company (hereinafter referred to as *"Seattle"*) and Woodhouse Chain Works (hereinafter referred to as *"Woodhouse"*)—sell, but do not manufacture; and, two—J. M. Russell Manufacturing Company (hereinafter referred to as *"Russell"*) and Turner & Seymour Manufacturing Company (hereinafter referred to as *"Turner & Seymour"*)—neither sell nor manufacture tire chains.[6]

PARAGRAPH TWO: Patent rights to cross-bar reinforced anti-skid devices used on tire chains were the subject of litigation which resulted in the confirmation of titles to the patents in American; thereafter and in 1937 American entered into license agreements with respondents McKay, Pyrene, Hodell, St. Pierre and Taylor (hereinafter referred to as the *"licensee group"*) under which said licensees "at their own option" might either manufacture the patented bar reinforced devices for their respective uses, or have the same manufactured for them by American, which latter practice was followed by all the licensees except McKay. The agreements provided for the payment of a 5 percent royalty and the sale of the unpatented chains with the patented devices at minimum prices and discounts fixed or to be fixed by American.[7] The agreement with McKay was terminated February 6, 1939, and the provisions under which American fixed minimum prices and discounts was cancelled in the agreements with the other licensees in December 1942, shortly before the filing of the complaint.[8] 1214 1215

PARAGRAPH THREE (a): In 1937, respondents American, McKay, Pyrene, and Hodell entered into an arrangement

[6] Stip. R. 599-610, 635, 643, 709.

[7] Com. Exs. 449 to and incl. 472, and sub-letters.

[8] Stip. R. 615-6, 635, 643.

with respondents Shirley, Olcott and Nichols, copartners trading under the firm name of Shirley, Olcott and Nichols (hereinafter referred to as "*Shirley*"), to act as manufacturers' sales representatives in the sale of the tire chains with the patented anti-skid reinforcement features, manufactured by respondents American, McKay, Pyrene, and Hodell, to agencies of the Federal Government through the Procurement Division of the Treasury and to others, the latter being here immaterial. Under the agreements, the Shirley firm was to receive orders for said chains; to enter such orders on the firm's books; to make out on the firm's own form an order for each such order for chains; to select
1217 one of said respondent manufacturers to fill and ship said order; to forward the firm's order form to such selected manufacturer; after receipt by the firm of such manufacturer's invoice made out to them, to prepare and send the firm's invoice to the purchaser; to receive payment of the firm's invoice and then remit to the manufacturer the firm's check for the amount of the payment, less commission. Respondents St. Pierre and Taylor became parties to said arrangement in respect to the sale of said chains to agencies of the United States Government commencing January 1, 1940. Respondent McKay withdrew from said arrangement on June 30, 1940, and thereafter had no dealings with respondent Shirley. All the remaining agreements were terminated October 15, 1942, approximately
1218 two months before the complaint issued.[9]

PARAGRAPH THREE (b): Pursuant to the arrangement described in the preceding paragraph respondent Shirley obtained approval by the Procurement Division of the Treasury of specifications for chains with the bar-reinforced patented devices,[10] and in response to advertise-

[9] Stip. R. 617-8, 635, 643, 726.

[10] Com. Exs. 302, 278, 94

1219

ments for bids issued by the Procurement Division, respondent Shirley, from time to time during the years 1937 to 1942, inclusive, submitted bids on tire chains embodying the patented anti-skid bar-reinforcement features which only the licensee group could make or sell. Such bids were submitted in the name of respondent Shirley. After contracts were awarded respondent Shirley, the federal agencies for whom such contracts were let submitted orders direct to Shirley [11] and Shirley apportioned them among such of the licensee group with which his firm at the time had contracts.[12]

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PARAGRAPH THREE (c): In 1937 and on or about the time the first contract was entered into by respondent Shirley with the Procurement Division, government agencies sent respondent Shirley orders for unpatented tire chains as well as for chains embodying the patented reinforced links. Respondent Shirley advised the government agencies in writing that the firm had no contract with manufacturers to supply standard unpatented tire chains, and at their request he obtained contracts with American, McKay, Pyrene and Hodell to include all types of chains manufactured by them in bids on government contracts. Shirley obtained copies of the base price lists and discount sheets of each member of the licensee group for whom he was authorized to act and filed them with the government agencies,[13] and during the years 1939 to 1942, inclusive, respondent Shirley submitted bids on calls from government agencies for bids on standard as well as patented chains. Such bids were submitted in the name of Shirley and when contracts were awarded Shirley the orders were sent direct to Shirley [14]

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[11] R. 616-7, 635, 643.

[12] Com. Exs. 116-A to 125-B, 129, 178, 147.

[13] Com. Exs. 302, 60.

[14] R. 618-9, 635, 643.

and apportioned among those manufacturing respondents with which Shirley had contracts.[12] Only delivered prices were quoted which were substantially identical irrespective of point of delivery in the United States, differing only in respects agreed upon by Shirley and the members of the licensee group with which Shirley at the time was under contract as illustrated in footnotes to the next paragraph.

PARAGRAPH THREE (d): Letters written by respondent Shirley to members of the licensee group explaining the collusive method to be employed in the submission of bids to the Procurement Division of the Treasury;[13] letters

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[13] Com. Ex. 302.—Shirley to Hodell, letter dated 3-22-38: "As you explained to me, you had talked this matter over with the industry *and it would be agreeable to them to advance their discounts a little and let me quote the regular price and the business automatically be awarded to us.*" (Italics supplied.)

Com. Ex. 207.—Shirley to Hodell, letter dated 9-6-39: "I am in receipt of your letter of September 1st, advising that after your conversation with Kirkpatrick that it is your belief that the *present group will stick together.* In view of the fact that you four are the only manufacturers and distributors of bar reinforced chains in accordance with the specifications, *that you should be [illegible] means quote me the regular price on the bar reinforced chains and the four of you quote 10% higher than your regular price* and on *the standard chains quote your regular price which should be close in line with the other manufacturers of standard chains but by giving me a 10% differential on the bar reinforced chains it will enable me to put in a price on all or none*, and certainly there is going to be someone who is quite likely to cut the price from two to five percent on the
1224 standard chains, but on the grand total of the bar reinforced chains and standard chains combined, *the 10% advantage you give me will make me low on the entire volume.*" (Italics supplied.)

Com. Ex. 143.—Shirley to American, letter dated 9-5-40: "I have your letter advising me that your firm is bidding on the above proposal. I am sure you are open to suggestion and I will say for your information that I think this is a very bad plan. If you will recall, through certain connections I got a $25,000. order for you and if your bid goes in direct along with the other chain manufacturers, the only thing that they can do will be to draw for the successful bidder. However, if you stay out of the picture and give us the

written by members of the licensee group to Shirley;[16] bids submitted, on calls for bids on chains issued by the Procurement Division of the Treasury, by Shirley and those licensees with whom his firm was at the time under contract;[17] the false certificates attached to bids submitted

opportunity of bidding on your materials, *or if you will bid 1% higher and let my bid be tied with the rest of the industry*, I have a good chance of getting this business for you due to the fact that they have Weed chains in stock and would prefer to have them all alike." (Italics supplied.)

(See also Com. Exs. 158, 160, 292, 303, 942-A-B.)

[16] Com. Ex. 144.—American's reply dated 9-6-40 to Shirley's letter dated 9-5-40, *supra* (Com. Ex. 143): "Referring to your letter of 1226
September 5 regarding Post Office Invitation 859 opening September 11—*we certainly appreciate your suggestion* and want to do everything possible to throw this business your way and to see that the Post Office uses Weed American Bar Reinforced Tire Chains.

"Unfortunately, as you know, we have a licensing agreement on this patented commodity with a resale set up for government work. Accordingly, no bar reinforced tire chain manufacturer can bid less or more than a certain amount without causing considerable friction among the licensees. We have avoided such a stipulation in the past and this license agreement has always run along very smoothly. Even though we would like to do as you suggest, the risk of misunderstandings would be too great.

"*We are going to quote right on the nose and are asking you to do the same. * * * if the bids are drawn from the hat, we at least will have two in at the same price against one bid from each other manufacturer.*" (Italics supplied.)

(See also Com. Ex. 60.)

[17] Bids of American, its three licensees, and Shirley; all bid the 1227
list price; American and its three licensees offered discounts of 57.989%; 57.986%; 57.989%; 57.988% and 58%, respectively (Com. Exs. 895-I, 897-H, 896-H, 899-P) and Shirley obtained the bid. This was in execution of the plan outlined in Shirley's letter to Hodell dated 3-22-38, *supra* (Com. Ex. 302).

Other bids submitted in conformity with the plan outlined in Shirley's letter to Hodell *supra* (Com. Ex. 302), resulted in awards to Shirley (Com. Exs. 893-A thru V; 901-A thru Z; 909-A thru T).

When identical bids on unpatented chains were submitted, conforming to plan outlined in American's letter to Shirley, *supra* (Com.

by the licensees and Shirley;[18] the memorandum of the Purchasing officer of the Procurement Division;[19] memorandum prepared by the Acting Chief Counsel for the Procurement Division and forwarded to the Assistant to the Chief Counsel for the Treasury Department relating to collusive bids on chains submitted by Shirley and the licensor and licensees;[20] conclusively establish, and it is so found as a fact, that respondents American, McKay, Hodell, Pyrene, St. Pierre and Taylor, with the aid and as-

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Ex. 144), Shirley and licensees' chances were greatly augmented by drawing "from the hat".

Award was made Shirley (Com. Ex. 930-A thru Z) on bids sub-
1229 mitted conforming to plan outlined in Shirley's letter to American, *supra* (Com. Ex. 297), where Shirley bid "all or none" on both the standard and reinforced tire chains.

[18] Conforming to Treasury regulations there was attached to each bid submitted by each of the licensees and Shirley a certificate in the following words "The undersigned represents that the prices stated in this bid are neither directly nor indirectly the result of any agreement with any other bidder" (for illustration see Com. Ex. 903-C).

[19] Com. Ex. 942-A-B.—Memorandum dated 6-1-40 stating "* * * those six firms (licensor and licensees) make no effort to compete merely submitting complimentary bids all of which are higher than that of Shirley, Olcott and Nichols."

[20] The memorandum, *inter alia*, stated: "The evidence presents such strong inferences of collusive bidding and of a combination in restraint of trade that it should, in my opinion, be brought especially to the attention of the Federal Trade Commission and the Attorney
1230 General with a view to possible proceedings under the antitrust laws. * * * The last four of the listed bidders clearly appear * * * to have submitted a *combined* bid through Shirley, Olcott & Nichols, and to have quoted slightly higher prices in bidding individually in order to give the *combined* bid priority. While Shirley, Olcott & Nichols could conceivably be a *bona fide* dealer in the products of all four manufacturers, and could have submitted a legitimate bid without having participated in any collusive arrangement with them, the inference is strong that the four manufacturers combined and bid through this dealer in order to obtain an advantage in distribution facilities, and that any appearance of competition among them is merely fictitious * * * " (Com. Ex. 887-B)

sistance of respondent Shirley, Olcott & Nichols, during the periods of each of them was in contract with the Shirley firm, did, together with their agents, Shirley, Olcott & Nichols, conspire together to fix prices of tire chains and secure contracts for chains from the Government of the United States *to the exclusion of all other competitors, including the other ten respondents* who manufactured and sold, or sold but did not manufacture, tire chains.

In respondent Shirley's letters to members of the licensee group there are occasional references to "the industry" [21] which had relation only to those members of the industry with which respondent Shirley, Olcott & Nichols had subsisting contracts and was limited to the licensee 1232
group—American, Pyrene and Hodell—during the period commencing in 1937 and ending October 15, 1942, with which group McKay was associated under contract with the Shirley firm from early in 1937 to June 30, 1940, and St. Pierre and Taylor from January 1, 1940 to October 15, 1942.[22]

PARAGRAPH FOUR: Neither respondents Cleveland, Bridgeport, Round California, Seattle, Woodhouse, Columbus McKinnon, International, Nixdorff-Krein, Peerless, Western, Russell nor Turner & Seymour entered into any license agreement with American, nor did any of them have any relations directly or indirectly with respondents Shirley, Olcott & Nichols [23]; nor is there any evidence that any of 1233

[21] Com. Exs. 302, 289, 292.

[22] *Supra*, Findings Par. 3 (a).

[23] A memorandum dated April 8, 1942 (Com. Ex. 56) was found in the files of the Shirley firm purporting to convey a message from Mr. J. J. Thiebath, an employee of respondent American, to Shirley to the effect that Noland would be "controlled". Noland was a jobber who submitted bids on behalf of respondent Cleveland. This, standing alone or repeated in Shirley's letters to members of

the respondents, Chain Institute, George J. Campbell, Jr., and Dennis A. Merriman, were directly or indirectly connected with respondents Shirley, Olcott & Nichols, or with any bids submitted by, through or upon their advice by any member of the licensee group under contract with them, nor that any of them did or performed any act or deed to assist or in furtherance of said conspiracy. Respondents Russell and Turner & Seymour neither manufactured nor sold tire chains.

PARAGRAPH FIVE: Respondent McKay terminated its contract with respondent American for the use of its
1235 patents on unpatented chains February 6, 1939. The provision in the contracts with respondent American by which American fixed the minimum price on chains, having its patented reinforced devices, was cancelled by all of its remaining licensees—Pyrene, Hodell, St. Pierre and Taylor—in December 1942, prior to the issuance of the complaint,[24] and American has permanently abandoned such a provision in its contracts.

Respondent McKay terminated its contract with Shirley, Olcott and Nichols June 30, 1940,[25] and respondents Pyrene, Hodell, St. Pierre and Taylor terminated their contracts with Shirley, Olcott and Nichols October 15, 1942, prior to the issuance of the complaint,[26] and permanently discontinued the practice.[27]

1236 the licensee group, might create the impression that respondent Cleveland was a party to the Shirley-licensee group conspiracy, but there is, however, no evidence that either respondent Cleveland or Noland had any relations directly or indirectly with Shirley, Olcott & Nichols, or that either of them was in anywise influenced by American or any of its five licensees.

[24] See Findings Par. 2.

[25] See Findings Par. 3 (a).

[26] Stip. R. 615-6, 635, 643.

[27] R. 962-4.

CONCLUSIONS OF LAW:

The acts and practices of respondent American and its five licensees, respondents McKay, Pyrene, Hodell, St. Pierre and Taylor (six of the sixteen respondents named in the complaint who either manufactured and sold, or who did not manufacture but sold tire chains (Findings Par. 1), as alleged in the complaint (Par. 6, Count 1) and sustained in the Findings (Par. 2) and the acts and practices of respondent American, its said five licensees and their agents, respondents Shirley, Olcott and Nichols, as alleged in the complaint (Par. 7, and subpars. in Par. 5, Count 1) and sustained in the Findings (Pars. 3(a) through (d)) while unlawful [25] were nevertheless unrelated to the 1238
acts and practices alleged in Paragraphs Five (excepting subparagraphs 17 and a part of subparagraphs 15 and 16) and Eight through Twelve of Count 1. The inclusion in the licensing agreements entered into between American and its said five licensees of the provision whereby respondent American fixed minimum prices and discounts on tire chains, to which were attached respondent American's patented cross-bar devices manufactured and sold or sold without manufacture by its licensees, as set forth in the Findings (Pars. 1 and 2) formed the basis for the employment of respondents Shirley, Olcott and Nichols by respondent American and its said five licensees, as set forth in the Findings (Par. 3(a)), which employment was primarily if not exclusively for the purpose of securing 1239
contracts from the government agencies for tire chains for the said licensor and its said licensees as set forth in the Findings (Par. 3 (b) and (c)) and the acts and practices

[25] Licensing agreement of American and its five licensees unlawful, Mercoid Corp. v. Minneapolis-Honeywell Regulator Co., 320 U. S. 680, at 684. Acts and practices unlawful F.T.C. v. Cement Institute, et al., 333 U. S. 683, decided April 26, 1948; Triangle Conduit & Cable Co. v. F.T.C. — Fed. 2(d) — decided May 12, 1948.

indulged in by respondent American, its five licensees, and respondents Shirley, Olcott and Nichols, as set forth in the Findings (Par. 3 (d)), all had relation to and were for the purpose of securing contracts for chains from the government agencies for the said licensor and its said licensees *to the exclusion* of all other chain manufacturers, *including the other ten respondents*—Cleveland, Bridgeport, Seattle, Woodhouse, Columbus McKinnon, International, Nixdorff Krein, Peerless, Western and Round California—a conspiracy on the part of American, and its said five licensees aided by their agents, respondents Shirley, Olcott and Nichols, against all their other alleged co-conspirators in
1241 the overall conspiracy alleged in Paragraphs Five and Eight through Twelve of Count 1 who manufactured and sold or sold without manufacturing tire chains as set forth in the Findings (Par. 3(d)). It therefore follows that as the unlawful acts and practices of the respondents American, McKay, Pyrene, Hodell, St. Pierre, Taylor, their respective officers and Shirley, Olcott and Nichols, as charged in Paragraphs Six and Seven and related subparagraphs of Paragraph Five of Count 1, and sustained in the Findings (Par. 3(a) through (c)) formed no link in, nor part of, but were plainly antagonistic to the overall conspiracy alleged in Paragraphs Five and Eight through Twelve of Count 1,[29] the motions of respondents American, McKay, Pyrene, Hodell, St. Pierre, Taylor, Shirley, Olcott, Nichols, Wm. D. Kirkpatrick (Vice Pres. of American) and Frank
1242 A. Bond (Vice Pres. of McKay) to strike and dismiss as to each of them Paragraphs Six and Seven and related matter in subparagraphs 15, 16 and 17 of Paragraph Five of Count 1 should be granted.

As an additional reason therefor, all of the acts and practices alleged in Paragraphs Six, Seven and related subparagraphs in Paragraph Five of Count 1 were perma-

[29] American Tobacco Co. v. U. S., 328 U. S. 781, Syl. 7

ntly discontinued prior to the filing of the complaint, as
forth in the Findings (Par. 5) and there is no reason
believe they will ever again be indulged in by the re-
ondents.[30]

As a further and additional reason therefor, an order
tered in conformity with the Findings and Conclusions
lating to the overall conspiracy alleged in Paragraphs
ve and Eight through Twelve of Count 1 will effectively
event any repetition of any of said acts and practices
See, *infra*, Form of Order).

Respondents Cleveland, Bridgeport, Round California,
attle, Woodhouse, Columbus McKinnon, International, 1244
ixdorff-Krein, Peerless, Western, Russell, Turner & Sey-
our, Chain Institute, George J. Campbell, Jr., and Dennis
. Merriman were neither directly nor indirectly connected
ith any of the acts and practices alleged in Paragraphs
ix, Seven and related subparagraphs of Paragraph Five
f Count 1, as set forth in the Findings (Par. 4) and their
espective motions to strike and dismiss as to them, and
ach of them, Paragraphs Six and Seven and related matter
ppearing in subparagraphs 15, 16 and 17 of Paragraph
ive of Count 1, should be granted.

Disposition of Remaining Motions

The motions of Alfred Peter Shirley, Floyd Bronson 1245
lcott and Forrest C. Nichols to dismiss the amended com-
laint as to each of them should be granted for the reason

[30] Dietzgen v. F.T.C., 142 F. (2d) 321. See affidavits of officers
f American, McKay, Pyrene, Hodell, St. Pierre and Taylor and
f Shirley, Olcott and Nichols attached to petition for severance
led by American, McKay, Pyrene, Hodell, St. Pierre and Taylor,
November 6, 1947; see also Resp. Ex. 47, containing definite assur-
nces that said practices were discontinued and would never again
e revived.

they were in no wise connected with the Institute or the overall conspiracy.

The separate motions filed by each of the remaining respondents at the conclusion of the Commission's case in chief and renewed when all parties rested, to dismiss the amended complaint as to each of them for lack of proof to sustain the charges in the complaint should be denied for the reason they were all members of the Institute or divisions thereof and knew or should have known the Institute and its membership were engaged in an unlawful enterprise and continued their membership therein without protest (Phelps Dodge Refining Corp., et al. v. F. T. C., 139
1247 F. (2d) 393 at pp. 396-7; 11 Am. Jurisprudence, pp. 580-1; F. T. C. v. Cement Institute decided by U. S. Supreme Court April 26, 1948, Supreme Court copy at pp. 10 and 30-4).

The separate motions of Turner & Seymour Manufacturing Company and J. M. Russell Manufacturing Company to dismiss Paragraphs Nine, Ten and Eleven of Count 1 of the amended complaint on the ground they did not manufacture or sell either welded or tire chain; manufactured and sold only sash and kindred chain which was a separate and distinct branch of the weldless chain industry and not mentioned in the complaint; and were not members of the Institute but only of the Sash and Kindred Chain Division thereof, should be denied for the reason that sash
1248 and kindred chain are weldless chain; that they were both members of the Sash and Kindred Chain Group of the Institute which was a part of the Institute, and knew or should have known the Institute and its members were engaged in an unlawful enterprise and continued their membership without protest.

The motions of Columbus McKinnon Chain Corporation to strike from the record all exhibits and testimony other

an the exhibits prepared or written by it, and all ex-ibits consisting of correspondence written by George J. ampbell, Sr., on the ground that no conspiracy to which was a party is established, should be denied for the eason the evidence does establish the existence of a con-piracy with which it was connected.

PART II.

The Overall Conspiracy Charged in Count 1.

What the Evidence Consists of:

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The evidence in support of the overall conspiracy harged in Count 1 (omitting the allegations contained in ars. 6, 7 and related matter appearing in Par. 5 recom-ended to be stricken, *supra*, Part I) consists of stipula-ions appearing in the transcript at pages 596-633, 634-7, 39-42, 704-42, 742-3, 871-8, 880-7, 889-95, 926-8, 931—Com. xs. 1636, 948—Com. Ex. 1650, 2044-7, 2244-55, 2260-84, 287-2301, and 1,625 documents the authenticity of which s admitted,[1] and 15 pages of oral testimony.[2] The evi-ence relied upon by respondents consists of 65 documents he authenticity of which is admitted; oral testimony largely xplanatory of the statements appearing in the stipula-ions; rebutting statements in the documents and explana-ory of the acts and practices of the respondents and the ffect thereof. As much of this evidence has been ren-1251 ered immaterial by recent decisions of the Supreme Court, preliminary review thereof can be dispensed with and he facts stated with appropriate footnotes.

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[1] R. 8-11, 20-148, 191-2, 183-5, 214-25, 154-67, 169-78, 179-80, 9-223, 226-46, 248-9, 526-7, 556-66, 392-3.

[2] R. 648-95, 704, 742, 754-7, 865, 889-91, 1524.

Findings of Fact

Count 1.

Paragraph One: *Description of Respondents.*

(1) Respondent Chain Institute, Inc., a trade association (hereinafter referred to as "*Institute*") is a corporation organized and existing under the laws of the State of Delaware, with its principal office at 208 South LaSalle Street, Chicago, Illinois. It was first organized in 1933.[3] Its members are divided into welded, weldless and tire chain groups or divisions, each group holding meetings separate
1253 and apart, but usually on the same day following the meetings of the Institute. In addition thereto there is a Sash and Kindred Chain Group recognized as a separate and distinct division, holding its meetings infrequently but usually on the same day the meetings of the Institute are held; companies which are members of this Group *only* do not receive notice of meetings of the Institute or copies of the minutes of its meetings. No such meetings have, however, been held for several years.[4]

(2) Respondent American Chain & Cable Company, Inc. (hereinafter referred to as "*American*"), is a corporation organized and existing under the laws of the State of New York, with its principal office at Bridgeport, Connecticut. Its general office is at 230 Park Avenue, New York, New
1254 York. It has a plant located at East Princess and Charles Streets, York, Pennsylvania, where it manufactures and sells welded, weldless and tire chain, and a plant at Braddock, Pennsylvania, where it manufactures and sells welded chain. Respondent American joined the Institute in June 1933, and has continuously since that time been a member.[5]

[3] R. 599.

[4] R. 2251-2; See, *infra*, Par. 2 for explanation of separate division of Sash and Kindred Chain.

[5] R. 599, 1281, 1476-7.

(3) Respondent Bridgeport Chain & Manufacturing Company (hereinafter referred to as "*Bridgeport*") is a Connecticut corporation with its principal office at 964 Crescent Avenue, Bridgeport, Connecticut, and plant at the same location, where it manufactures and sells weldless chain and sells welded and tire chain.[6]

(4) Respondent The McKay Company (hereinafter referred to as "*McKay*") is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal offices located at McKay Building, Pittsburgh, Pennsylvania. McKay has a plant at York, Pennsylvania, where it manufactures and sells welded, weldless and tire 1256
chain, and a plant at McKees Rocks, Pennsylvania, where it manufactures and sells welded chain. Respondent McKay joined the Institute in June 1933 and has continuously since that time been a member.[7]

(5) Respondent Pyrene Manufacturing Company (hereinafter referred to as "*Pyrene*") is a corporation organized and existing under the laws of the State of Delaware, with its principal office located at 560 Blmnt. Avenue, Newark, New Jersey, and plant at Empire Street, Newark, New Jersey, where it manufacturers and sells tire chain. Respondent Pyrene joined the Institute in June 1933, and has continuously since that time been a member.[8]

(6) Respondent Hodell Chain Company (hereinafter re- 1257
ferred to as "*Hodell*") is a corporation organized and existing under the laws of the State of Ohio. Said respond-

[6] R. 599-600.

[7] R. 600, 977-80.

[8] R. 600. By letter dated April 30, 1948, to the Secretary of the Commission, Pyrene announced the sale of its tire chain business to The Newark Chain Company, not a respondent in this proceeding.

ent was organized in 1896 and until recently traded under the name and title Chain Products Company. Prior to using this name this Company was known as the Cleveland Galvanizing Company.[9] Respondent has a plant at Cleveland, Ohio, where it manufactures and sells welded, weldless and tire chain. Respondent Hodell joined the Institute in 1935, but resigned therefrom in 1939.[10]

(7) Respondent St. Pierre Chain Corporation (hereinafter referred to as "*St. Pierre*") is a corporation organized and existing under the laws of the State of Massachusetts, with its principal office located in Worcester, Massachu-
1259 setts, and plant at the same location, where it manufactures and sells tire chain. Recently it has manufactured and sold the type of welded chain known as stud link anchor chain;[11] it does not manufacture or sell any weldless chain.[12] Respondent St. Pierre joined the Institute in June 1933 and has continuously since that time been a member.[13]

(8) Respondent S. G. Taylor Chain Company (hereinafter referred to as "*Taylor*") is a corporation organized and existing under the laws of the State of Illinois, with principal office located at 3—141st Street, Hammond, Indiana, and plant at Hammond, Indiana, where it manufactures welded and tire chain and sells welded, weldless and tire chain. Respondent Taylor joined the Institute in June 1933 and has continuously since that time been a member.[14]

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[9] R. 1001.

[10] R. 600-1.

[11] R. 1525.

[12] R. 1533.

[13] R. 601.

[14] R. 601.

(9) Respondent Cleveland Chain & Manufacturing Company (hereinafter referred to as *"Cleveland"*) is a corporation organized and existing under the laws of the State of Ohio with principal office located at Broadway and Henry Streets, Garfield Heights, Cleveland, Ohio, and plant at the same location, where it manufactures and sells welded, weldless and tire chain. Respondent Cleveland joined the Institute in June 1933 and has continuously since that time been a member.[15]

(10) Respondent Columbus McKinnon Chain Corporation (hereinafter referred to as *"Columbus McKinnon"*) is a corporation organized and existing under the laws of the State 1262
of New York, with principal office located at Tonawanda, New York, and plant at the same location where it manufactures welded and tire chain and sells welded, weldless and tire chain. Respondent Columbus McKinnon joined the Institute in June 1933 and has continuously since that time been a member.[16]

(11) Respondent International Chain & Manufacturing Company (hereinafter referred to as *"International"*) is a corporation organized and existing under the laws of the State of Pennsylvania, with principal office located at Norway and Elm, York, Pennsylvania, and plant at the same location, where it manufactures and sells welded, weldless and tire chain. Respondent International joined the Institute in June 1933, resigned therefrom on June 17, 1263
1939, rejoined on June 15, 1940, and has continuously since the latter date been a member.[17]

(12) Respondent Nixdorff-Krein Manufacturing Company (hereinafter referred to as *"Nixdorff-Krein"*) is a

[15] R. 601-2.

[16] R. 602, 928.

[17] R. 602-3.

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corporation organized and existing under the laws of the State of Delaware, with principal office located at 900 Howard Street, St. Louis, Missouri, and plant at St. Louis, Missouri, where it manufactures and sells welded and tire chain and sells weldless chain. Respondent Nixdorff-Krein joined the Institute in June 1933 and has continuously since that time been a member.[18]

(13) Respondent Peerless Chain Company (hereinafter referred to as "*Peerless*") is a corporation organized and existing under the laws of the State of Minnesota, with its principal office located at Winona, Minnesota, and plant at the same location, where it manufactures welded and tire
1265 chain, and sells welded, weldless and tire chain. Peerless began to manufacture weldless chain in 1941 and has a very small capacity.[19] Peerless joined the Institute in July 1933 and has continuously since that time been a member.[20]

(14) Respondent Round California Chain Company (hereinafter referred to as "*Round California*") is a corporation organized and existing under the laws of the State of California, with its principal office located on Bay Shore Highway, South San Francisco, California, and plant at the same location, where it manufactures and sells welded chain and sells weldless and tire chain.[21]

(15) Respondent J. M. Russell Manufacturing Company
1266 (hereinafter referred to as "*Russell*") is a corporation organized and existing under the laws of the State of Connecticut with its principal office located at Naugatuck, Connecticut, and plant at the same location, where it manufa

[18] R. 603.

[19] R. 1934-5.

[20] R. 603.

[21] R. 603-4.

tures and sells only a few types of the kind of weldless chain known as sash and kindred chain. Respondent Russell joined the Sash and Kindred Chain Group of the Institute in July 1933 and has continuously since that time been a member of the said Group.[22]

(16) Respondent Seattle Chain & Mfg. Company (hereinafter referred to as *"Seattle"*) is a corporation organized and existing under the laws of the State of Washington, with principal office at 6921 East Marginal Way, Seattle, Washington, and plant at the same location, where it manufactures and sells welded chain and sells weldless and tire chain.[23] 1268

(17) Respondent Turner & Seymour Manufacturing Company (hereinafter referred to as *"Turner & Seymour"*) is a corporation organized and existing under the laws of the State of Connecticut with principal office at Torrington, Connecticut, and plant at the same location, where it manufactures and sells only the type of weldless chain known as sash and kindred chain. Respondent Turner & Seymour joined the Sash and Kindred Chain Group of the Institute in July 1933 and has continuously since that time been a member of said Group.[24]

(18) Respondent Western Chain Products Company (hereinafter referred to as *"Western"*) is a corporation organized and existing under the laws of the State of 1269
Illinois, with its principal office located at 1807 West Belmont Avenue, Chicago, Illinois, and plant at the same location, where it manufactures welded and tire chain and sells welded, weldless and tire chain. It began to manufac-

[22] R. 604, 2244.

[23] R. 604.

[24] R. 604-5, 2260-1.

ture weldless chain in 1945.[25] Respondent Western joined the Institute in July 1933 and has continuously since that time been a member.[26]

(19) Respondent Woodhouse Chain Works (hereinafter referred to as "*Woodhouse*") is a corporation organized and existing under the laws of the State of New Jersey, with principal office at 251 Third Street, Trenton, New Jersey, and plant at the same location, where it manufactures and sells welded chain and sells weldless and tire chain. Respondent Woodhouse joined the Institute in June 1933 and has continuously since that time been a member. Respondent Woodhouse was purchased by respondent
1271 Cleveland in 1947.[27]

(20) Respondent Dennis A. Merriman, an individual (hereinafter referred to as "*Merriman*") has been Managing Director of respondent Institute with office located at 208 South LaSalle Street, Chicago, Illinois, since August 1, 1938.[28]

(21) Respondent Walter S. McCann, an individual (hereinafter referred to as "*McCann*") was Secretary & Treasurer of respondent Institute, during part of the period covered by the amended complaint, with office located at 208 South LaSalle Street, Chicago, Illinois. McCann died on May 19, 1945.[29]

1272 (22) Respondent Wm. D. Kirkpatrick, an individual (hereinafter referred to as "*Kirkpatrick*") is Vice Presi

[25] R. 2135.

[26] R. 605.

[27] R. 605-6, 1670.

[28] R. 606, 612.

[29] R. 606.

ent of respondent American, and from November 1942 to November 1944 was president of respondent Institute. His office is located at the office of American at York, Pennsylvania. Since June 1938 he has represented American in its membership in the Institute and as such representative has attended meetings of representatives of other members, and in that capacity has served on committees and has written and otherwise communicated with other representatives of members concerning action of the Institute, its officials and members.[30]

(23) Respondent Frank A. Bond, an individual (hereinafter referred to as "*Bond*") is Executive Vice President 1274
and Secretary of respondent McKay, with office located at McKay Building, Pittsburgh, Pennsylvania. Since 1933 he has represented McKay in its membership in respondent Institute and as such representative of McKay has attended meetings of representatives of other members, and in that capacity has served on committees and has written and otherwise communicated with other representatives of members concerning action of the Institute, its officials and members. He served from June 1933 to date as Chairman of the Traffic Committee of the Institute in dealing with freight rate matters.[31]

(24) Respondent George J. Campbell, Jr., an individual (hereinafter referred to as "*Campbell*") has been President of respondent International since September 1941, with 1275
offices located at the principal place of business of International in York, Pennsylvania. From November 1942 to November 1944 he served as vice president of respondent Institute. Since September 1941 he has represented International in its membership in the Institute and as such representative has attended meetings of representatives

[30] R. 606-7.

[31] R. 607

of other members, and in that capacity has served on committees and has written and otherwise communicated with other representatives of members concerning action of the Institute, its officials and members. George J. Campbell, Sr., was president of International from 1922 to September 9, 1941, when he died. From June 19, 1933, to June 17, 1939, and from June 15, 1940, to September 9, 1941, he represented International in its membership in the Institute and as such representative attended meetings of representatives of other members, and in that capacity served on committees and wrote to and otherwise communicated with other representatives of members concerning action of the Institute, its officials and members.[32]

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(25) Respondent Alfred Peter Shirley (hereinafter referred to as "*Shirley*") is an individual, a resident of Punto Gordo, Florida, who is an engineer and manufacturers' sales representative and is a partner in the firm of Shirley, Olcott & Nichols, which maintains its offices in the Mills Building, Washington, D. C.[33]

(26) Respondent Floyd B. Olcott (hereinafter referred to as "*Olcott*") is an individual who resides at 7828 Orchid Street, N. W., Washington, D. C., who is an engineer and manufacturers' sales representative and is a partner in the firm of Shirley, Olcott & Nichols, which maintains its offices in the Mills Building, Washington, D. C.[34]

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(27) Respondent Forrest G. Nichols (hereinafter referred to as "*Nichols*") is an individual who resides at 4702 Quebec Place, Washington, D. C., and who is an engineer and manufacturers' sales representative and is

[32] R. 607-8.

[33] R. 608.

[34] R. 608.

a partner in the firm of Shirley, Olcott & Nichols, which maintains its offices in the Mills Building, Washington, D. C.[35]

(28) Respondents Cleveland, Seattle, Round California and Bridgeport are affiliated through common ownership of the controlling capital stock of each of said respective corporations. L. D. Cull is Chairman of the board of directors of each of said four corporations. Through his representation of Cleveland in its membership in respondent Institute he also represented Seattle, Round California and Bridgeport, and their interests, at meetings of members of the Institute and in other activities of the Institute.[36] 1280
Each of these affiliated companies (now also including respondent Woodhouse) merchandised each others' products and there were actual transactions of purchase and sale between them, i.e., one affiliate would buy a certain quantity of a particular chain item from another affiliated company and pay the first company for such chain and then resell the chain as if it had manufactured it itself.[37]

(29) Each of the respondents described in subparagraphs (2) to (19), inclusive, of this paragraph is now, and was during the period covered by the amended complaint, engaged in the manufacture and sale of chain and chain parts.[38]

PARAGRAPH TWO. *Description of Chain Industry and Interstate Commerce.* 1281

Respondent manufacturers produce various types of steel, alloy-steel and other metallic chain and chain parts.

[35] R. 609.

[36] R. 609.

[37] R. 1677.

[38] R. 609.

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The principal types of chain involved are welded chain, weldless chain, sash and kindred chain and tire chain.[39]

Welded chain is so designated because each link is closed and sealed through welding. It includes chain of various size and weights for many uses such as anchor chains, log chains, tie chains (for securing dairy cows at stanchions), tie-out chains (for use in securing cows and other animals for grazing, etc.) and trace chains (for harnessing teams and for other agricultural uses). Since the development of the art of electric welding, the welded chain industry has used it for mass production of welded chain, although the earlier fire welding method is still used for the larger
1283 sizes. In the trade, most welded chain is also referred to as commercial chain and pound chain. Such welded chain is priced by the manufacturers on a per pound basis.[40]

Weldless chain is for the most part light in weight and in general is used where the stronger chain is not required. Weldless chain is classified by the trade into two principal types: (1) Ordinary weldless chain, which is made by bending wire into the form of links and twisting or tying rather than welding it; this type of weldless chain is used as cow ties, porch swing chain, well chain, dog leads, animal trap chains, and for many other purposes; (2) Sash and kindred chain, which is made by stamping or cutting the links from flat metal strip stock; this type of weldless chain is used as window sash chains, transom chains, fur-
1284 nace chain, ships' telegraph chain, and for many other purposes.[41] For a number of years sash and kindred chain was manufactured by companies which did not make any other types of chain and the history and selling practices

[39] R. 609-10.

[40] R. 610.

[41] R. 610

indicate that this is a separate branch of the chain industry.[42]

Tire chains are made by the welding process but are so linked as to form two line chains connected by cross chains at equal distances so that they may be attached around the wheels of motorized equipment, including automobiles, trucks and farm tractors.[43] In the early days side chains were weldless and cross chains welded, but now side chains are welded also.[44] Tire chain is sold to an entirely different class of customers than either welded or weldless chain.[45]

Percentage of Chains Made by Respondent Manufacturers, Interstate Commerce and Competition: 1286

Production: Respondent manufacturers in the course and conduct of their business manufacture, sell and distribute approximately 85 percent[46] of the welded chain, weldless chain, sash and kindred chain and tire chain produced in the United States.

Interstate Commerce: The said respondent manufacturers sell such products at various points throughout the United States to wholesalers, dealers and consumers including the United States Government, and when sales are made, respondent manufacturers have regularly shipped and do ship said products to the purchasers at points in the several states of the United States and the District of Columbia other than in the States of origin of the shipments. They are engaged in commerce in selling and 1287

[42] R. 1258, 2244-5, 2261, 2263.

[43] R. 610-11.

[44] R. 976.

[45] R. 1057-8.

[46] R. 1882.

shipping said products, within the meaning of the term "commerce" as defined in the Federal Trade Commission Act and the Clayton Act.[47]

Competition: Every respondent that manufactures and sells, or that does not manufacture but sells, either welded, weldless, sash and kindred or tire chains, is a natural competitor of every other respondent that manufactures and sells, or that does not manufacture but sells, a like kind of chain, and were it not for the price obstructions hereinafter pointed out would be in free and open competition with its natural competitors.

1289 PARAGRAPH THREE: *The Chain Institute.*

Respondent Chain Institute, Inc. was organized in June 1933 by respondent manufacturers American, McKay, Pyrene, St. Pierre, Taylor, Cleveland, Columbus McKinnon, International, Nixdorff-Krein and Woodhouse.[48] The members of the Institute have operated, and now operate, the Institute as an incorporated trade association to carry on in general the usual functions of a trade association. The Institute has carried on a number of activities which promote the mutual interests of the respondent members, including exchange of general information on market conditions,[49] exchange of information on labor relations,[50] cooperative advertising,[51] attempting to secure a tariff on chain products in order to meet foreign competition,[52]
1290 standardization of welded chain in cooperation with the

[47] R. 611.

[48] R. 611.

[49] R. 1156, 1317, 2281.

[50] R. 1156, 2281.

[51] R. 1317, 2250, 2281.

[52] R. 2250; Com. Ex. 229.

U. S. Bureau of Standards,[53] a statistical program[54] and a tire chain specifications program which has been beneficial to the tire chain manufacturers, to federal, state and local government agencies and to the using public generally,[55] and other activities hereinafter referred to.

PARAGRAPH FOUR: *The Trade Practice Price Formulae Adhered to by Respondents, Supplemented by Tacit Agreements and Understandings:*

1. *Price Leadership.* Respondent American has for more than twenty-five years been the most important factor in the chain industry in this country. It manufactures and sells all types of chains mentioned in the complaint and 1292
is the largest manufacturer of most of said types.[56] It has maintained its position through a vigorous research program which has resulted in improvement in the quality of chains then in use and the development of new products, a detailed cost accounting system, extensive advertising and efficient and economical operation.[57] It has been a leader in announcing price quotations on all types of chain and chain products referred to in the complaint. Its price lists and discount sheets, setting forth the prices and discounts to different classes of customers—jobber-dealers, dealer-customers and customers—and all revisions thereof as and when issued were and are simultaneously forwarded two or three days before the effective price date shown thereon to its jobber-customers and each of the respondent 1293
manufacturers who were and are also its customers.[58] Within a day or two after learning of a price change by

[53] R. 1140-1; 1426-8; Resp. Ex. 7.

[54] Resp. Exs. 53, 53A, 53B at R. 2424-7.

[55] R. 1424, 1463, 1549, 2023.

[56] R. 613.

[57] R. 613, 1332-3.

[58] R. 1332-5, 875; Com. Exs. 153, 154, 35, 39.

American the other respondent manufacturers changed their price to conform thereto and as soon as practicable, usually within from two to six weeks thereafter, published price lists and discount sheets, applicable to each class of customers, of their own conforming thereto[59] and transmitted copies thereof to other respondent manufacturers.[60] Since January 1937 "there has been only one decline in the published prices in the chain industry.[61] In some instances respondent Turner & Seymour (who manufactured and sold only sash and kindred chains) published changed price lists increasing prices without waiting for American.[62] It is stipulated that respondent manufac-
1295 turers' published prices and published discounts for like chains were generally uniform at any one particular time but that there were times when there were substantial variations in the quoted prices.[63] The delay in the issuance

[59] R. 1895-6.

[60] R. 1753; Com. Exs. 277, 1246.

[61] R. 1218.

[62] R. 2273.

[63] R. 872-5; Columbus McKinnon did not sign the stipulation but a comparison of its price lists with those of American's will disclose identity of prices and discounts. For illustration compare—

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American's Price Lists Com. Exs.	*Date*	*Columbus McKinnon's Price Lists Com. Exs.*	*Date*
474-B	4/20/36	1274-B	4/20/36
475	4/20/36	1274-E	4/20/36
490-B	10/20/39	1285-B	10/20/39
491	10/20/39	1286-A	10/21/39
492-C	10/20/39	1287-A	10/21/39
495	7/22/40	1288-G	7/22/40
497	7/22/40	1288-E	7/22/40
550	3/29/41	1289-G	4/ 2/41
550	4/ 2/41	1289-E	4/ 2/41
503	9/25/41	1290-G	9/29/41

of revised price lists to conform to those of American's explains in part the lack of uniformity at times in the price lists of all respondents.

Prices and discounts established by respondent American were the result of understandings with other respondent manufacturers as hereinafter set forth.[64]

Evidence disregarded.[65]

2. *Understandings as to Future Prices and Price Maintenance Assistance Given by Respondent Merriman.*

A. *Understandings as to Future Prices.* Early in 1938 a vacancy, caused by death, occurred in the office of 1298

[64] *Infra,* subpar. 2. A. of Par. 4.

[65] Explanation offered by respondents for uniformity of price lists and discount sheets: This uniformity of published prices has resulted from the fact that all types of chain are homogeneous articles. With respect to welded chain, weldless chain and sash and kindred chain it is not possible to distinguish between the product of one manufacturer and the product of another manufacturer, once the chain has been removed from its container (R. 1159, 2144, 2276). No buyer will pay more for welded, weldless or sash and kindred chain made by one manufacturer than for that made by another (R. 1034, 1035, 2144). Buyers of this type of chain are well informed as to the prices of all manufacturers (R. 1160). With respect to tire chains the situation is different only to the extent that extensive advertising by some manufacturers (R. 1036, 1289-91) has created consumer preference for their brands and has enabled them to publish higher prices than the manufacturers of non-advertised brands (R. 1036, 2153), although one unpatented tire chain is about as good as another (R. 1302). 1299

This evidence in the opinion of the Examiner constitutes no valid defense in view of certainty of variations in cost of manufacture (R. 1871), the establishment of prices by American pursuant to previous understandings, and the uniform participation by all the respondents, where each was aware of the other's activities in a number of practices a part of which will be hereinafter set forth and which formed separate links in a chain leading to price fixation. (William Goldman Theatres, Inc. v. Loew's, Inc., et al., 150 F. (2d) 738; United States v. Socony Vacuum Oil Company, 310 U. S. 150 at 221.)

managing director of respondent Institute and a committee was appointed to investigate and recommend a suitable person to fill the vacancy.[66] The committee conferred with, and recommended the appointment of, respondent Dennis A. Merriman,[67] who had been vice president and general manager of sales of the American Steel and Wire Company, a position which had brought him into contact with jobbers in the same field as those to whom the chain manufacturers sold. He had had some 47 years of business experience.[68] Merriman did not seek the position and reluctantly accepted appointment, taking office August 1, 1938,[69] and has served in that capacity from that time to the present.[70]

1301 He was employed to perform only the normal functions of the operating executive of a trade association.[71] He had no control or authority over prices of chains and chain products.[72]

Immediately upon taking office Mr. Merriman, among other things, familiarized himself with the office work, the general activities of the Institute, the products of each mill and its personnel, went through the mills of American "at frequent intervals", talked to the jobbers, many of whom were old friends, and pointed out to them that members of the Institute were very high class manufacturers and did business in a very high class manner, to enable him "to better promote the sale of chains".[73] He sought

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[66] Com. Ex. 225-A; R. 2049-51.

[67] Com. Ex. 225-D.

[68] R. 2049, 2051.

[69] R. 2049; Com. Ex. 225-D.

[70] R. 612.

[71] R. 2089-90.

[72] R. 1144, 1342, 1552, 1587, 1623-4, 1646, 1765-6, 2017, 2071-2, 2166-7.

[73] R. 2055-62.

and obtained advice of counsel with reference to discussions of prices at Institute meetings and was advised that the members were at liberty to discuss past transactions but not present or future prices.[74] He attended all meetings of the Institute, presided at some, and when he did not preside sat next to the presiding officer.[75] He testified that at one or two of the meetings the members started to discuss present and future prices which he promptly stopped and caused their remarks to be stricken from the record[76] and thereafter there were no discussions of present or future prices at regular (formal) meetings of the Institute.[77] Other respondents testified that there were "lots of discussions" during "formal meetings" of increased 1304
costs of labor, materials and freight rates *with relation to published prices.*[78] The evidence fairly establishes and it is so found as a fact that current prices were discussed while the members were at Institute meetings, and that before and after the formal meetings were convened and adjourned present and future prices were discussed and understandings arrived at with reference to continuance of, or changes in, current prices, which understandings were reflected in price lists thereafter issued by American.[79]

[74] R. 2083, 1748.

[75] R. 2062, 2102.

[76] R. 2124; Note—The minutes of the meetings of the Institute are silent on any attempted discussion of present or future prices or "off-the-record" discussions. 1305

[77] R. 2104.

[78] R. 1330-1, 1108-10, 1871.

[79] Wm. D. Kirkpatrick, Vice President of American, wrote W. C. Perkins, Manager of American's Pittsburgh sales office under date of November 14, 1938—"I am not sure I told you that on Thursday and Friday of this week we will have a Chain Institute meeting. Of course, *you know how we have been fighting for price stabilization* and perhaps you will run into some irregularities where you will see

B. *The Price Maintenance Assistance Given by Respondent Merriman.* The years 1932, the early part of

positive evidence of price weakening. If you have any definite information, will you kindly get it to me prior to this meeting * * * " (Com. Ex. 91).

(See Kirkpatrick's explanation R. 1328-30, 1463-4.)

April 5, 1939, W. C. Perkins, Manager of American's Pittsburgh sales office wrote Wm. D. Kirkpatrick, Vice President of American: "I have not heard from you further since your recent suggestion that the Industry felt prices on trace chains should be *determined* in advance of the meeting of the convention at New Orleans on 17th inst. * * *. You recall the fiasco last spring when we very ill-advisedly *agreed to the establishment of a list of 64¢ on 7-8-2 Ring, with a discount of 20%*, and attached to this was the provisions that
1307 an additional 10% was to be accorded to certain leading customers. I did not agree to this program but I was overruled and we put ourselves at the mercy of some of our competitors, *who immediately proceeded to disregard what they stated they intended to do*, and I think it would be a very fatal mistake for us to stick our neck out again" (Com. Ex. 87). (Italics supplied.)

The record contains a number of communications written by George J. Campbell, Sr. (Com. Exs. 360, 361, 364, 372, 376, 323, 354, 353, 352, 344, 382, 333, 335, 381, 330, 311, 387, 312) former trustee of the Institute (Com. Ex. 223-C) and president of International Chain & Manufacturing Company, who died September 9, 1941, and who was not available as a witness when the hearings were held. No opportunity existed for any explanation of any of the statements in the communications or for cross-examination. Some of the statements appearing in his letters were conclusively shown to have been erroneous. If any of his statements should be given evidentiary value, and they are entitled to some, they strongly tend to establish price agreements at Institute meetings, but as their
1308 consideration leads into a highly controversial field, they are disregarded.

Respondent Bond, President of the McKay Company described the discussions when the members were not in formal meetings thusly (R. 1097): "* * * when any two businessmen get together, whether it is a Chain Institute meeting or a Bible class meeting, if they happen to belong to the same industry, *just as soon as the prayers have been said, they start talking about the conditions in the industry, and it is bound definitely to gravitate, that talk, to the price structure in the industry*. What else is there to talk about?" (Italics supplied.)

That the maintenance of current and changes in prices were the result of agreements, is conclusively shown by the following: Dis-

1933, 1936 and 1938 were years of business depression in the Chain Industry,[80] and prior to the appointment of Mr. Merriman as managing director the Institute had experienced "a hard time".[81] There had been, and were then continuing, price wars, largely confined to the depression years, and to the sale of tire chains (not to jobbers, the usual sales channel) but to automotive chains and chain stores such as Sears-Roebuck, who received lower prices than the jobbers, the cut in prices being reflected in higher discounts which at times amounted to as much as 80 percent of the published price. There had also been cutting of prices (failure to maintain the published prices and discounts) to the jobbers, resulting in part from the lower 1310
prices given the chain stores, which were likewise reflected in increased discounts.[82] Price cutting by the members was freely discussed at regular Institute meetings, caused animated discussions when the members were not in meetings[83] and inquiries by members to verify reports of price cutting. Occasionally Merriman, at the request of a mem-

cussions in formal meetings of the Institute of price cutting (which of necessity included identity of members engaging therein); discussions before and after the formal meetings of present and future prices by the members—matters in which they were vitally concerned; the systematic *pro forma* and prompt adoption of each changed price list as and when issued by American by each of the respondent manufacturers—which in itself indicated prior agreement; and the prompt transmission by each respondent of its revised price list, to all other respondent manufacturers, supplemented by the two letters of Kirkpatrick and Perkins. 1311

[80] R. 885.

[81] R. 2089.

[82] R. 2010-13, 1876.

[83] R. 1096-7; Testimony of respondent Bond: "Well, frankly you know how you do at these meetings. You hear a lot of tripe and a lot of crap and red tape which they put through, and they put on a lot of rigmarole and put you on these committees doing a lot of different things. A lot of it, too, has been very constructive. * * *

"But, after we get rid of a lot of this stuff, maybe while we are at lunch or adjourning for a drink or something, then we start talk-

ber, made the inquiries for him and reported to him the information obtained.[84] This was understood by one respondent to be "part of his job".[85] As the economic condition improved and the demand for chains gradually caught up with production, price cutting receded and ended in 1941.[86]

The price leadership plan adopted and followed by the members was known to Merriman,[87] who had developed a

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ing. Maybe somebody will say to you, 'You so-and-so Son of a B., what did you do down at Bill Jones'?' And you will say, 'What did I do?' Well, he'd say, 'You give them some extras.' And then somebody calls somebody a liar and so forth, and then maybe he
1313 would say, 'Well, I have got the evidence that you did, and you are a liar,' and then you would get into a fight with this fellow, and first thing you know, somebody else would come up and listen to the conversation, and then there would be six of them there, and they would be picking on you—I don't mean picking on me, but picking on these price cutters, you understand.

"So, well, maybe by that time they had had three or four drinks and the thing begins to get a little tougher, and the drinks loosen up some tongues—of course, I don't drink, you understand now, gentlemen, therefore I was always in perfect control of my vocal chords, and I have a marvelous vocabulary, I can assure you, when it comes to calling names, and it has been tested by every member of the Institute, and when I call a guy a dirty, low kind of a so-and-so price cutter, he knows he has been called a price cutter (Laughter).

"I will be frank, and if you want to crucify me, I will add this: I would tell him further that if he didn't stop these damn price cuttings, I would show him how to cut prices, and many times I did cut them, and when I cut a price, and if it was your price I was
1314 cutting, take it from me, brother, you knew your price had been cut."

[84] R. 2072-7, 1115-7, 1224-7, 1336-8, 1587, 1591-2, 1646, 1764-5, 1880, 1943-4, 1978-9, 2189-90.

[85] R. 1977-8.

[86] R. 2012.

[87] Although Merriman did not testify as to his knowledge or lack of knowledge of the plan, it would be a serious reflection upon the intelligence of a man of his achievements and intimate knowledge of the chain industry to contend otherwise. It is an inescapable conclusion.

strong personal philosophy with reference to selling in accordance with published prices, which he impressed upon the members at meetings of the Institute[88] and which was known to the officers and members of the Institute at the time he was employed.[89] By impressing upon the members his philosophical views—strict adherence to published prices and discounts—and aiding them in detecting price cutters in their midst, he contributed much to, and played an important part in furthering the plan designed to accomplish price uniformity in the chain industry.

3. *Basing Point Systems.* It was stipulated by and between the attorneys for all the respondents,[90] except Columbus McKinnon, Turner & Seymour and Russell,[91] that— 1316

[88] Respondent Merriman testified: "My philosophy is that if a member discovers or ascertains that his prices in effect as published are not being maintained, that as soon as he so discovers, he should publish a new price list, and not have a published price list in effect that did not represent what he was getting for his material" (R. 2084).

In a speech at a meeting of the Chain Institute in January 1940 he said in part: "Based on my own experience, I consider it a sign of weakness for any sales manager to feel obliged to sell his product below the price of a competitor for similar quality and service. Competition is like water: it seeks its own level, up or down, and while there always will be variations in prices owing to different conditions existing, there is no reasonable excuse why any first class concern should have a published list of prices and then deliberately shade them" (Com. Ex. 212). 1317

[89] Before his employment his qualifications were carefully inquired into and his strong personal views with reference to adherence to published prices must have been developed while he was in charge of sales for the American Steel and Wire Company, and must have been known to the members of the Institute.

[90] R. 508; 619, Par. 8.

[91] Columbus McKinnon, R. 743; Turner & Seymour, R. 635; and Russell, R. 640.

"With respect to the type or types of chain it manufactures and/or sells, each Respondent Member, with the *knowledge that other Respondent Members simultaneously do likewise,* uses the applicable basing point, multiple basing point and/or delivered pricing practices and methods hereinafter more fully described in PARAGRAPHS NINE, TEN AND ELEVEN HEREOF." [92]

4. *"Pittsburgh-plus" Method of Selling Welded Chains and Donley Freight Rate Book.*

A. *"Pittsburgh-plus" Method.* It is stipulated by and between counsel for all respondents,[93] selling welded chain,
1319 as follows:

"PARAGRAPH NINE: For the period from about 1900 to date, practically all Welded Chain sold in the United States by each manufacturer thereof has been quoted on the basis of delivered prices computed by adding to a basic price, f.o.b., manufacturers' plant an amount equal to the rail freight applicable to such shipment from Pittsburgh, Pennsylvania, to the point of delivery, irrespective of the point from which shipment is actually made. This method of computing and quoting delivered prices for Welded Chain was first adopted

[92] Columbus McKinnon (R. 743) admits that the facts set forth in Paragraphs Nine, Ten and Eleven are true, and Turner & Seymour (R. 635) and Russell (R. 640) who sell only sash and kindred
1320 chain, admit each used the multiple basing point system described in Paragraph Ten of the main stipulation and that the facts set forth in Paragraph Ten are true, but by rejecting Paragraph Eight all three do not admit that their use of one or more of said systems was "with the knowledge that other respondent members simultaneously do likewise" which is immaterial as the use of all of the systems was common to the industry and each respondent conforming to any one system in the sale of any one of the three kinds of chains knew that all other respondents selling like chains were using the same system.

[93] R. 620. Stip. Par. 9; see footnote 92.

by other chain manufacturers before any of the Respondent Manufacturers entered the industry. The original manufacturers of Welded Chain were led to adopt said method of pricing by the use of the same method by the basic steel industry from which they procured their requirements of steel rod used in the manufacture of Welded Chain. As a result of the long-established use of this method of pricing by other manufacturers, each Respondent Manufacturer adopted the same method when he entered the field. Each Respondent Manufacturer, engaged in the manufacture or sale of Welded Chain as a general practice, now sells, and during the period covered by the amended complaint has sold, such chain on a basis in accordance with delivered price quotations computed in the manner set forth hereinabove. Since June, 1945 Respondent Taylor has not sold any chain on this basis." 1322

The "Pittsburgh-plus" method was never used by respondents Pyrene, St. Pierre, Russell and Turner & Seymour.

B. *Donley Freight Rate Book.* As a convenience to the members of the Institute selling welded chain, and for the purpose of insuring uniformity in computing prices under the Pittsburgh-plus plan, the Institute employed Charles Donley, an independent traffic consultant, in 1933 to compile freight rates relating to welded chain from Pittsburgh, Pennsylvania, to destinations throughout the United States and to revise the same from time to time.[94] In 1933, during the existence of the N. R. A. Program, the welded chain manufacturers found it necessary to have available a compilation of freight rates from Pittsburgh to various points in order to enable them to comply with the code by strictly observing prices filed with N. R. A.[95] 1323

[94] R. 612, 2343.

[95] R. 1203.

To save costs the Institute (then the Code Authority) had this done for all members. [96] The rates shown in the book were actual freight rates from Pittsburgh to various destinations. Since the demise of N. R. A. the Institute has caused the book to be revised from time to time for the use of its members selling welded chains, and Donley has forwarded the revised copies as issued to the members, and the Institute has forwarded copies to nonmembers.[97] The book is used for determining prices.[98]

5. *"Freight Equalization" Method of Selling Weldless Chain.* It is stipulated by and between counsel for all
1325 respondents[99] as follows:

> "PARAGRAPH TEN: For the period from about 1900 to date, practically all Weldless Chain sold in the United States by each manufacturer thereof has been quoted on the basis of a delivered price, computed by adding to a basic price, f.o.b., the manufacturer's plant an amount equal to the rail freight applicable to such shipment to the point of delivery from either York, Pennsylvania; Cleveland, Ohio; Cincinnati, Ohio; or Bridgeport, Connecticut, whichever point is located closest freightwise to the point of delivery, irrespective of the point from which shipment is actually made. This method of computing and quoting delivered prices was first adopted when the four points mentioned herein were the only points in the United States at
1326 which Weldless Chain was manufactured, and was in

[96] R. 1203-4.

[97] Com. Ex. 227-A.

[98] R. 612, subpar. (8-a). Apparently an identical practice was condemned in Triangle Conduit and Cable Co. v. F. T. C., decided May 12, 1948, by U. S. Circuit Court of Appeals, 7th Circuit, 8th Par.

[99] R. 620-1, stip. Par. 10; see footnote 92.

effect prior to the time that any of the Respondent Manufacturers entered the field. At the present time approximately 75% of the Weldless Chain sold in the United States is manufactured at those four points. Although there are a few variations from the practice described herein, as to certain respondents, certain products and certain areas, each Respondent Manufacturer, engaged in the manufacture or sale of Weldless Chain, as a general practice, now sells, and has during the period covered by the amended complaint sold, such chain in accordance with the delivered price quoting basis computed in the manner set forth hereinabove."

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Neither respondents Pyrene nor St. Pierre ever made or sold weldless chain. There was no phantom freight in any of the sales of respondents Western, Russell and Turner & Seymour.[100]

6. *"Universal Delivered Price" or The "Single Zone" Method of Selling Tire Chain.* It is stipulated by and between counsel for all respondents[101] as follows:

"Paragraph Eleven: For the period from about 1904 to date, practically all Tire Chains sold in the United States by each of the manufacturers thereof have been quoted on the basis of f.o.b. mill prices, which are uniform among customers of such manufacturer throughout the United States, with full freight allowed from the place of shipment to destination, irrespective of the point at which delivery is made. The practice of selling Tire Chains on said basis was first adopted by American when it entered upon the manufacture of Tire Chains in 1904 in order to prop-

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[100] R. 1006, 2252, 2275.

[101] R. 621-2, stip. Par. 11.

erly publicize and popularize Tire Chains throughout the United States, as a new product. In 1921, other manufacturers, including certain of Respondent Manufacturers, entered the field and adopted the same method of pricing which had been thus long-established. Each Respondent Manufacturer, engaged in the manufacture or sale of Tire Chains, as a general practice, now sells, and during the period covered by the amended complaint has sold, Tire Chains on the basis hereinabove described."

Respondents Russell and Turner & Seymour never made
1331 or sold tire chains.

7. *The Net Price Stabilization Results Obtained Through Planned Concerted Action.* Between 80 and 95 percent of the sales of all the three kinds of chains sold by the respondent members during the period mentioned in the complaint were at uniform prices except during the depression years of 1932, the early part of 1933, 1936 and 1938 when the percentage of uniformity was somewhat less. To have determined the percentage with greater approximation would have necessitated the examination of more than 30,000 invoices considered typical of all invoices issued during the period mentioned in the complaint. To save time and expense a limited number of invoices demonstrating the manner, form and substance of respondent
1332 members' practices in making sales of their welded, weldless and tire chains were agreed upon as typical of all and introduced in evidence.[102] It was then stipulated by all respondents,[103] except Columbus McKinnnon,[104] that while counsel were unable to agree on percentages, counsel supporting the complaint contend that in an average of 95

[102] R. 872-5.

[103] R. 875, 880-7, 903-4.

[104] R. 926-8.

 1333

percent of respondents' total sales of each of the three types of chain and chain products (i.e., welded, weldless and tire chain), during the period covered by the complaint, respondents' pricing and selling practices were uniform; whereas, counsel for the respondents, while conceding that said practices were followed, contend that they were followed in an average of only 80 percent of the total sales. The stipulation then recites—

"That the difference between the contentions of counsel supporting the complaint and the respondents herein with respect to said percentage figures of 95 per cent and 80 per cent, respectively, arises from the fact that approximately 20% of respondents' total 1334
sales, as evidenced by the invoices studied, were at prices or discounts or extras different from their published list prices, published list discounts, and/or published list extras; that counsel supporting the complaint concede that not over 5% of such total sales involved nonuniformity of prices among the respondents, and that the remaining 15% of such total sales represented sales to large buyers, including mail order houses and railroads, concerning which sufficient information is lacking (without extensive further study of invoices and the taking of testimony) to determine whether or not such instances involved nonuniformity of prices among the respondents.

"That counsel supporting the complaint concede that, 1335
during the depressed business periods of 1932, the early part of 1933, and 1936 and 1938, respectively, the said estimated average percentage of respondents' total sales in which respondents followed the pricing and selling practices hereinbefore set forth was considerably lower than said 95%, and respondents contend that during said depressed business periods said estimated average percentage was considerably lower than said 80%."

An examination of the invoices introduced in evidence and stipulated as showing the manner, form and substance of the method employed by Columbus McKinnon in making sales of its welded, weldless and tire chains and chain products[105] discloses substantially the same percentage of uniformity of price.

PARAGRAPH FIVE: *Public Interest.* The acts and practices of the respondent manufacturers, set forth in the preceding Findings, had and have the capacity, tendency and effect to fix prices of chain and chain products, thereby obstructing the play of natural competitive forces and to
1337 unfairly discriminate in price between purchasers of chain and chain products, and were and are to the injury of the public, and the public has a direct and substantial interest in this proceeding.

Evidence disregarded as not the best evidence.[106]

Other evidence disregarded.[107]

Evidence rejected as immaterial.[108]

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[105] R. 926-8.

[106] The evidence relied upon by respondents on the more important issues, and rejected as not the best and controlling evidence, is summarized in their requested Findings, and appears in the transcript, reference to which is hereby made, as follows: Purpose and extent of price discussions at Institute meetings, R. 3128-9; the nonparticipation of the Institute and Merriman in price maintenance, R.
1338 3130-2; American's independent establishment of prices, R. 3133-5 and explanation of uniformity of prices, R. 3538. Much of this testimony is rejected as so completely at variance with the convincing and controlling evidence cited (*supra*, Par. Four, subpars. 1, 2-A, 2-B, pp. 39-47) that it cannot be accepted.

[107] Other evidence rejected relates to Pittsburgh-plus, R. 3172-3, freight equalization, R. 3173-5, single zone or universal delivered price, R. 3177, methods of selling and constitutes no defense in view of the recent decisions of the courts holding their systematic use unlawful.

[108] Evidence deemed immaterial in the light of recent court rulings (F. T. C. v. Cement Institute decided by the U. S. Supreme

COUNT 2.

PARAGRAPHS ONE and TWO: The Commission adopts as part of its Findings of Fact One and Two under this Count 2, so much of Paragraphs One and Two of its Findings of Fact under Count 1 as describe the chain industry, the respondent manufacturers, their business, the interstate character of their sales and their competitive situation.

PARAGRAPH THREE: A. *"Pittsburgh-plus" Method of Selling Welded Chain.* The Commission adopts as part of its Findings of Fact Three under this Count 2, sub-paragraph 4 of Paragraph Four of its Findings of Fact under Count 1. 1340

B. Since June 1945 respondent Taylor,[109] and since 1946 respondents, Peerless,[110] Western and Nixdorff-Krein [111] have sold, f.o.b., factory, equalizing freight with Pittsburgh.

C. The "Pittsburgh-plus" method of selling has never been used in the sale of stud link anchor chain (R. 989-93,

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Court April 26, 1948, and Triangle Conduit and Cable Co., et al. v. F. T. C., decided May 12, 1948, by U. S. Circuit Court, 7th Circuit) is summarized by respondents in their requested Findings to which reference is here made, as follows: Explanation of uniformity of prices, R. 3135-6; Resale prices, jobbers' agreements, R. 3138-9; channels of distribution, R. 3139; delivered price method of selling, R. 3139-41; Campbell letters, R. 3141-2; tire chain patent licenses, R. 3142-5; Shirley, Olcott & Nichols, R. 3146-9; "Pittsburgh-plus" method of selling, R. 3150-3; Donley freight rate compilation, R. 3153-4; freight equalization method of selling weldless chain, R. 3155-61; zone price method of selling tire chain, R. 3162-5; public interest, R. 3165-7. 1341

[109] R. 620, 1924.

[110] R. 1926, 2131.

[111] R. 2131, 2298.

1479, 1533), alloy chain (R. 1921), or wrought iron chain (R. 1922-4).

PARAGRAPH FOUR: *"Freight Equalization" Method of Selling Weldless Chain.* The Commission adopts as its Findings of Fact Three, under this Count 2, subparagraph 5 of Paragraph Four of its Findings of Fact under Count 1.

PARAGRAPH FIVE: *"Universal Delivered Price" or "Single Zone" Method of Selling.* The Commission adopts as its Findings of Fact Five under this Count 2, subparagraph 6 of its Findings of Fact Four, under Count 1.

1343 PARAGRAPH SIX: *"Customer Discounts" or "Channels of Distribution."* It is stipulated that the published list prices, published discounts therefrom and published list extras thereon for welded chain,[112] weldless chain [113] and tire chain [114] of any one of the respondent manufacturers were as published at the time by all other respondents selling such products. This resulted from the agreed price leadership plan adopted and followed by all respondents, with minor exceptions not here material, under which respondent American's price lists, discount sheets, list extras therefrom, applicable to each of the several classes of customers therein designated—jobber-dealers, dealer-customers and customers—were adopted by all other respondent manufacturers as and when issued.[115]

1344

[112] R. 872.

[113] R. 873.

[114] R. 874.

[115] See, *supra*, subpar. 1, Par. Four.

CONCLUSIONS OF LAW.

PARAGRAPH ONE: Pursuant to Count 1 of the amended complaint herein, the Commission concludes from the evidence of record, and therefore finds, that the capacity, tendency and effect of the combination, conspiracy and planned course of action maintained by respondent manufacturers, their directors and officers, and the respondent Institute and its directors and officers named or referred to therein, in the manner and form set forth in the above and foregoing Findings of Fact, and the acts and practices performed thereunder and in connection therewith by said respondents, as set forth in said Findings has been, and 1346
is, to hinder, lessen, restrain and suppress competition in the sale and distribution of said chain and chain products among and between the several states of the United States and in the District of Columbia; by maintaining artificial and monopolistic methods and prices in the sale of welded chain and welded chain products, weldless chain and weldless chain products, including sash and kindred chain, and tire chain and tire chain products; depriving purchasers of said chain and chain products of the benefit of competition in price; unfairly discriminating in price between purchasers of chain and chain products, uniformly maintaining common rate factors and common delivery charge factors or "freight adders" used and useful in determining price quotations and prices for said chain and chain products; 1347
establishing and maintaining classification of customers and uniform prices, discounts, and conditions of sale to each class; and otherwise to maintain and promote the purpose of their combination and conspiracy to hinder, lessen and restrain competition in the sale and distribution of said chain and chain products.

PARAGRAPH TWO: Pursuant to Count 2 of the amended complaint herein the Commission concludes from the evi-

dence of record, and therefore finds, that the capacity, tendency and effect of the use by each respondent manufacturer named therein, and using either one or more of the following pricing formulae—the "Pittsburgh-plus" basing point, freight equalization or multiple basing point, or the universal delivered price or single zone—to determine price quotations and prices made, or to be made to purchasers of welded chain and welded chain products, weldless chain and weldless chain products, including sash and kindred chain, and tire chain and tire chain products at any given destination concurrently with similar use of the same pricing formula by other of the said respondents
1349 has been, and is, to hinder, lessen and restrain competition in price in the sale and distribution of said chain and chain products; to deprive purchasers of the benefit of competition in price; to unfairly discriminate among purchasers in price; and to create in each of said respondents a dangerous tendency toward monopolistic control over price in the sale and distribution of said chain and chain products.

CONCLUSIONS ON COUNTS 1 AND 2.

COUNT 1. The aforesaid acts and practices of the respondent manufacturers, their and each of their directors and officers and the respondent Institute, its directors and officers, constitute unfair methods of competition in com-
1350 merce and unfair and deceptive acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

COUNT 2. The aforesaid acts of each of the said respondent manufacturers constitute violations of the provisions of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (49 Stat. 1526; 15 U. S. C. A., Sec. 13, as amended).

RULINGS ON REQUESTED FINDINGS.

Requested Findings of counsel for complaint:

COUNT 1:

Par. 1. Allowed in substance with additions.

Par. 2. Allowed.

Par. 3. Allowed in part and rejected in part as not related to the over-all conspiracy.

Par. 4. Allowed in substance.

Par. 5. Allowed in part and rejected in part for reasons stated in footnote 79, Campbell letters. 1352

Par. 6. Allowed in part, and rejected in part as not related to the over-all conspiracy, or immaterial to the issues, or unreliable.

Par. 7. Rejected as argument.

Par. 8. Rejected as argument.

COUNT 2: Rejected as argument.

Findings requested by all respondents except Columbus McKinnon:

COUNT 1:

Par. 1. Allowed with minor changes.

Par. 2. Allowed in substance. 1353

Par. 3. Allowed in part and rejected in part as either immaterial, or not sustained by the evidence as a whole.

Par. 4. Rejected as having no relation to the over-all conspiracy.

1354 *Trial Examiner's Recommended Decision.*

Par. 5. Rejected as having no relation to the overall conspiracy.

Par. 6. Allowed in part and rejected in part as either immaterial or not sustained by the evidence.

Par. 7. Allowed in part and rejected in part as either immaterial or not sustained by the evidence.

Par. 8. Allowed in part and rejected in part as immaterial.

1355 Par. 9. Rejected as immaterial in view of recent Court decisions.

Par. 10. Rejected as wrong.

Par. 11. Rejected as wrong.

COUNT 2:

Par. 1. Allowed with slight changes.

Par. 2. Allowed with slight omissions.

Par. 3. Allowed in part and rejected in part as either immaterial or not sustained by the evidence.

Par. 4. Allowed in part and rejected in part as
1356 either immaterial or not sustained by the evidence.

Par. 5. Allowed in part and rejected in part as either immaterial or not sustained by the evidence.

Par. 6. Rejected as immaterial or not sustained by the evidence.

Par. 7. Rejected as wrong.

Par. 8. Rejected as wrong.

Findings requested by Columbus McKinnon:

Par. 1. Allowed.
Par. 2. Allowed.
Par. 3. Allowed.
Par. 4. Allowed.
Par. 5. Rejected as immaterial.
Par. 6. Allowed.
Par. 7. Rejected.
Par. 8. Allowed.
Par. 9. Rejected. 1358
Par. 10. Rejected.
Par. 11. Rejected.
Par. 12. Rejected.
Par. 13. Allowed in part and conclusion rejected.
Par. 14. Allowed.
Par. 15. Allowed.
Par. 16. Rejected.
Par. 17. Rejected.
Par. 18. Rejected.
Par. 19. Allowed.
Par. 20. Rejected.
Par. 21. Rejected.
Par. 22. Rejected.
Par. 23. Rejected. 1359
Par. 24. Rejected.
Par. 25. Rejected.
Par. 26. Rejected.
Par. 27. Rejected.
Par. 28. Rejected.
Par. 29. Rejected.

Turner & Seymour joined in the Findings requested by all respondents except Columbus McKinnon, and in addition filed on May 20, 1948, a separate memorandum in which it made no specific request for Findings.

RECOMMENDED ORDER.

This proceeding having been heard by the Federal Trade Commission upon the amended complaint of the Commission, the answers of respondents, the stipulations, testimony and other evidence in support of and in opposition to the allegations of said amended complaint taken before
1361 an Examiner of the Commission theretofore duly designated by it, report of the Trial Examiner

[Here insert intervening procedure]

and the Commission having made its Findings as to the Facts and its Conclusion that said respondents have violated the provisions of the Federal Trade Commission Act and of subsection (a) of Section 2 of an act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes," approved October 15, 1914 (the Clayton Act) as amended by the act approved June 19, 1936 (the Robinson-Patman Act),

1362 It is ORDERED that respondent Chain Institute, Inc., a trade association duly incorporated, its trustees, officers, agents, representatives, and employees, and the corporate respondents American Chain & Cable Company, Inc., The Bridgeport Chain & Manufacturing Company, The McKay Company, Pyrene Manufacturing Company, Hodell Chain Company, St. Pierre Chain Corporation, S. G. Taylor Chain Company, Cleveland Chain & Manufacturing Company, Columbus McKinnon Chain Corporation, Interna-

tional Chain & Manufacturing Company, Nixdorff-Krein Manufacturing Company, Peerless Chain Company, Round California Chain Company, J. M. Russell Manufacturing Company, Seattle Chain & Mfg. Company, Turner & Seymour Manufacturing Company, Western Chain Products Company and Woodhouse Chain Works, their respective directors, officers, agents, representatives and employees, in or in connection with the offering for sale, sale and distribution of chain and chain products in interstate commerce, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination or conspiracy between and among any two or more 1364
of said respondents, or between any one or more of said respondents and others, not parties hereto, to do or perform any of the following things:

1 (a). Quoting for sale or selling their welded chain and welded chain products at Pittsburgh-plus prices, by which is meant respondents' systematic practice of quoting and selling said products manufactured at and shipped from points other than Pittsburgh at their, f.o.b., Pittsburgh prices plus amounts equivalent to what the railroad freight charges on such products would be if in fact actually shipped from Pittsburgh to each different destination.

1 (b). Collecting, compiling or exchanging information concerning common-carrier transportation charges for 1365
welded chain used or to be used as a factor in the price of welded chain, or using, directly or indirectly, any such information so compiled or received as a factor in the price of chain and chain products.

2. Quoting for sale or selling their weldless chain and weldless chain products, including sash and kindred chain, at prices calculated or determined pursuant to and in accordance with the multiple basing point delivered price

system, by which is meant respondents' systematic practice of quoting and selling such products at delivered prices computed by adding to a base price for such product at either York, Pennsylvania, Cleveland, Ohio, Cincinnati, Ohio, or Bridgeport, Connecticut, whichever point is located closest freightwise to the point of delivery, irrespective of the point from which shipment is actually made, an amount equal to the rail freight from such basing point to the point of delivery.

3. Quoting for sale or selling their tire chains at prices calculated or determined pursuant to and in accordance
1367 with the universal delivered price or single zone method of selling tire chain, by which is meant respondents' systematic practice of quoting and selling such products to customers located anywhere in the United States at uniform, f.o.b., mill prices with full freight allowed the purchasers from the place of shipment to destination, irrespective of point at which delivery is made.

4. In connection with or in aid of any plan, system, acts or practices prohibited in paragraph 1.

5. In connection with or in aid of any plan, system, acts or practices prohibited in paragraphs 1 and 2 above,—

(a) Quoting or selling chain and chain products at
1368 delivered prices which systematically include a common-carrier transportation factor greater or less than the actual cost of such common-carrier transportation from the point of shipment to destination.

6. In connection with or in aid of any plan, system, acts or practices prohibited in paragraphs 1, 2 and 3 above,—

(a) Exchanging among themselves their price lists, discount sheets, extras, channels of distribution and any other similar data concerning prices.

7. Discriminating in price between or among their respective customers of welded chain and welded chain products, and weldless chain and weldless chain products, including sash and kindred chain, by systematically charging and accepting mill net prices which differ by the amounts necessary to produce delivered costs to purchasers identical with delivered costs available to such purchasers through purchases from other respondents.

8. Discriminating in price between or among their respective customers of tire chain by systematically charging uniform mill prices and accepting mill net prices which differ exactly by the difference in freight costs paid by the 1370
respective customers and refunded to such customers by respondents.

IT IS FURTHER ORDERED that said respondents shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

IT IS FURTHER ORDERED that the motions filed by J. M. Russell Manufacturing Company, Turner & Seymour Manufacturing Company, Columbus McKinnon Chain Corporation, American Chain & Cable Company, Inc., Cleveland Chain & Manufacturing Company, The Bridgeport Chain & Manufacturing Company, Round California Chain Com- 1371
pany, Seattle Chain & Mfg. Company, Woodhouse Chain Works, Hodell Chain Company, International Chain & Manufacturing Company, The McKay Company, Nixdorff-Krein Manufacturing Company, Peerless Chain Company, Pyrene Manufacturing Company, St. Pierre Chain Corporation, S. G. Taylor Chain Company, Western Chain Products Company, Wm. D. Kirkpatrick, Frank A. Bond, George J. Campbell, Jr., Dennis A. Merriman, and Chain

Institute, Inc., to dismiss the complaint as to them, and each of them, be and the same are hereby severally overruled.

IT IS FURTHER ORDERED that the motions of respondents American Chain & Cable Company, Inc., The McKay Company, Pyrene Manufacturing Company, Hodell Chain Company, St. Pierre Chain Corporation, S. G. Taylor Chain Company, Cleveland Chain & Manufacturing Company, The Bridgeport Chain & Manufacturing Company, Round California Chain Company, Seattle Chain & Mfg. Company, Woodhouse Chain Works, Columbus McKinnon
1373 Chain Corporation, International Chain & Manufacturing Company, Nixdorff-Krein Manufacturing Company, Peerless Chain Company, Western Chain Products Company, J. M. Russell Manufacturing Company, Turner & Seymour Manufacturing Company, Chain Institute, Inc., George J. Campbell, Jr., Dennis A. Merriman, Wm. D. Kirkpatrick and Frank A. Bond to strike Paragraphs Six and Seven and related matter appearing in subparagraphs (15), (16) and (17) of Paragraph Five of the amended complaint (for the reasons stated in Part I.) be and the same are hereby severally granted.

IT IS FURTHER ORDERED that the separate motions of respondents Turner & Seymour Manufacturing Company and J. M. Russell Manufacturing Company to sever and dis-
1374 miss as to each of them Paragraphs Nine, Ten and Eleven of the amended complaint, be and the same are hereby severally denied.

IT IS FURTHER ORDERED that the motion of respondent Columbus McKinnon Chain Corporation to strike from the record certain exhibits and testimony as not having been properly admitted in evidence with respect to it, be and the same is hereby denied.

1375

IT IS FURTHER ORDERED that the complaint be and the same is hereby dismissed as to respondent Walter S. McCann, now deceased.

IT IS FURTHER ORDERED that the complaint be and the same is hereby dismissed as to Alfred Peter Shirley, Floyd Bronson Olcott and Forrest C. Nichols (for the reasons stated in Part I.).

Respectfully submitted,

WEBSTER BALLINGER,
Trial Examiner.

1376

September 24, 1948.
WB:hcc

Filed Sept. 23, 1948.

Amendment to Trial Examiner's Recommended Decision.

September 25, 1948, the Trial Examiner's Recommended Decision in this proceeding was promulgated. In said Decision on page 60, the following statement appears:

> "Turner & Seymour joined in the Findings requested by all respondents except Columbus McKinnon, and in addition filed on May 20, 1948, a separate memorandum *in which it made no specific request for Findings.*"

1377

The above statement is in error in the following respect. In addition to joining in the requested findings submitted by all respondents, except Columbus McKinnon, counsel for respondents Turner & Seymour Manufacturing Company and the J. M. Russell Manufacturing Company did

make separate and specific requests for findings, which were considered by the Examiner. The requested findings do not comply with Rule XXI in that they do not "contain exact references to the record", or any references whatsoever. Notwithstanding this omission, the Trial Examiner is of the opinion that counsel are entitled to a "ruling on each such proposal". Explanatory of the Examiner's rulings thereon, it should be stated that both of said respondents are included in the Recommended Order for two primary reasons, viz: 1st, because both were members of the Sash and Chain Division of the Chain Institute and were a part of said organization. They knew or should have
1379 known the Institute and its members were engaged in an unlawful enterprise and continued their membership without protest (see authorities cited, Trial Examiner's Recommended Decision, p. 25); and 2nd, both systematically used the freight equalization system in computing the delivered price on sales of 100 pounds or more of their sash and kindred chains—which were weldless chains—to purchasers located closer to the mill of a competitor than to either of their mills with the knowledge their competitors used the same system (see cases cited footnote 108, pages 54-5, Recommended Decision).

RULINGS ON REQUESTED FINDINGS

1380 "Findings" requested by Turner & Seymour:

Par. 1. Allowed.
Par. 2. Rejected.
Par. 3. Allowed in part and rejected in part.
Par. 4. Rejected.
Par. 5. Allowed in part.
Par. 6. Allowed.
Par. 7. Rejected.
Par. 8. "

Amendment to Trial Examiner's Recommended Decision. 1381

Par. 9. "
Par. 10. "
Par. 11. "
Par. 12. "
Par. 13. "
Par. 14. "
Par. 15. "
Par. 16. "
Par. 17. "
Par. 18. "
Par. 19. "
Par. 20, and all subpars. Rejected.
Par. 21. Rejected.
Par. 22. " 1382
Par. 23. "
Par. 24. "
Par. 25. "
Par. 26. "
Par. 27. "
Par. 28. "
Par. 29. "
Par. 30. Allowed.
Par. 31. "
Par. 32. Rejected.
Par. 33. Allowed.
Par. 34. Rejected.
Par. 35. "
Par. 36. Allowed in substance. 1383
Par. 37. "
Par. 38. Rejected.
Par. 39. "
Par. 40. "
Par. 41. Allowed in substance.
Par. 42. Rejected.
Par. 43. "
Par. 44. "

1384 *Amendment to Trial Examiner's Recommended Decision.*

Par. 45. Allowed in substance.
Par. 46. Rejected.
Par. 47. Allowed in substance.
Par. 48. Rejected.
Par. 49. "
Par. 50. "
Par. 51. "
Par. 52. "
Par. 53. "
Par. 54. "
Par. 55. Allowed in substance.
Par. 56. Rejected.
Par. 57. "
1385
Par. 58. "
Par. 59. Allowed in substance.
Par. 60. "
Par. 61. Rejected.
Par. 62. "
Par. 63. "
Par. 64. "
Par. 65. "
Par. 66. "
Par. 67. "
Par. 68. "
Par. 69. "
Par. 70. "
Par. 71. "
1386 Par. 72. "
Par. 73. "
Par. 74. "
Par. 75. "
Par. 76. "
Par. 77. Allowed.
Par. 78. Allowed in substance.
Par. 79. Rejected.

"Findings" requested by J. M. Russell:

Par. 1. Allowed in substance.
Par. 2. Rejected.
Par. 3. Allowed in substance.
Par. 4. Allowed.
Par. 5. Rejected.
Par. 6. "
Par. 7. "
Par. 8. "
Par. 9. "
Par. 10. "
Par. 11. "
Par. 12. " 1388
Par. 13. "
Par. 14. "
Par. 15. Allowed in substance.
Par. 16. "
Par. 17. Rejected.
Par. 18. "
Par. 19. "
Par. 20. "
Par. 21. "
Par. 22. "
Par. 23. "
Par. 24. "
Par. 25. Allowed in substance.
Par. 26. " 1389
Par. 27. Rejected.
Par. 28. Allowed in substance.
Par. 29. Rejected.
Par. 30. "
Par. 31. "
Par. 32. "
Par. 33. "
Par. 34. Allowed in substance.

1390 *Amendment to Trial Examiner's Recommended Decision.*

Par. 35. Rejected.
Par. 36, "
Par. 37. "
Par. 38. "
Par. 39. Allowed in substance.
Par. 40. "
Par. 41. Rejected.
Par. 42. "
Par. 43. Allowed in substance.
Par. 44. Rejected.
Par. 45. "
Par. 46. "
1391 Par. 47. "
Par. 48. "
Par. 49. "
Par. 50. "
Par. 51. Allowed in substance.
Par. 52. Rejected.

"Conclusions" requested by both Turner & Seymour and J. M. Russell:

Count I, (a). Rejected.
Count II, (a). Rejected.
" (b). "
" (c). "
" (d). "
" (e). "
1392 " (f). "
" (g). "
" (h). "
" (i). "

"Proposed Order" requested by Turner & Seymour and J. M. Russell:

Rejected.

One further correction:

Page 56, Paragraph Four, third line—substitute the word "Four" for the word "Three".

Respectfully submitted,

WEBSTER BALLINGER,
Trial Examiner.

September 30, 1948.
WB:hgw

Filed October 1, 1948.

Notice of Corrections in the Trial Examiner's Recommended Decision in the Above-entitled Matter. 1394

Page 63:

Strike out paragraph "4".

Change paragraph numbered "5" to paragraph numbered "4".

Change paragraph numbered "6" to paragraph numbered "5".

Before paragraph numbered "7", insert the following:

"IT IS FURTHER ORDERED that said respondents named in the preceding order be and they are hereby ordered to forthwith cease and desist from:" 1395

Change the numbers "7" and "8" preceding the next two paragraphs to "1" and "2".

Please make the above-indicated changes on all copies.

WEBSTER BALLINGER,
Trial Examiner.

October 6, 1948.
Filed October 6, 1948.

1396

Exceptions of Certain Respondents to the Trial Examiner's Recommended Decision, and to the Trial Examiner's Failure to Include Proposed Findings and Conclusions Requested by the Respondents.

Come Now the respondents Chain Institute, Inc. (hereinafter referred to as "Institute"), American Chain & Cable Company, Inc. (hereinafter referred to as "American"), Bridgeport Chain & Manufacturing Company (hereinafter referred to as "Bridgeport"), The McKay Company (hereinafter referred to as "McKay"), Hodell Chain Company (hereinafter referred to "Hodell"), St. Pierre Chain Corporation (hereinafter referred to as "St. Pierre"), S. G. Taylor Chain Company (hereinafter referred to
1397 as "Taylor"), Cleveland Chain & Manufacturing Company (hereinafter referred to as "Cleveland"), Columbus McKinnon Chain Corporation (hereinafter referred to as "Columbus McKinnon"), International Chain & Manufacturing Company (hereinafter referred to as "International"), Nixdorff-Krein Manufacturing Company (hereinafter referred to as "Nixdorff-Krein"), Peerless Chain Company (hereinafter referred to as "Peerless"), Round California Chain Company (hereinafter referred to as "Round California"), J. M. Russell Manufacturing Company (hereinafter referred to as "Russell"), Seattle Chain & Mfg. Company (hereinafter referred to as "Seattle"), Turner & Seymour Manufacturing Company (hereinafter referred to as "Turner & Seymour"), Western Chain
1398 Products Company (hereinafter referred to as "Western"), Woodhouse Chain Works (hereinafter referred to as "Woodhouse"), Dennis A. Merriman, an individual (hereinafter referred to as "Merriman"), Wm. D. Kirkpatrick an individual (hereinafter referred to as "Kirkpatrick"), Frank A. Bond, an individual (hereinafter referred to as "Bond"), and George J. Campbell, Jr. an individual (hereinafter referred to as "Campbell"), by Kittelle & Lamb, attorneys and, pursuant to Rule 23 of

Exceptions of Certain Respondents to the Trial Examiner's Recommended Decision, and to the Trial Examiner's Failure to Include Proposed Findings and Conclusions Requested by the Respondents. 1399

the Rules of Practice of the Federal Trade Commission, respectfully except, and hereby file with the Commission their exceptions, to the Trial Examiner's recommended decision in the above entitled matter, and to the Trial Examiner's failure to include proposed findings and conclusions requested by the respondents, all as hereinafter set forth.

The exceptions herein contained and filed are general exceptions on behalf of all of the respondents hereinbefore named. In addition, certain of said respondents may file 1400
separate and supplementary exceptions to parts of the Trial Examiner's recommended decision applicable particularly to such respondents, and/or to the Trial Examiner's failure to include proposed findings and conclusions requested by such respondents under Rule 21 of the Commission's Rules of Practice. All of the respondents herein named hereby join in all such separate and supplementary exceptions to the extent pertinent to them or their interests.

EXCEPTIONS

1. Said respondents except to the inclusion in the first two lines of the first paragraph of the "Preliminary Statement" on page 3 of the Trial Examiner's recommended 1401
decision of the words "Pursuant to the provisions of the Federal Trade Commission Act," for the reason that said respondents contend that neither the complaint nor the amended complaint in this proceeding complies with the requirement of Section 5 of the Federal Trade Commission Act that proceedings by the Federal Trade Commission thereunder shall be in the public interest.

1402 ***Exceptions of Certain Respondents to the Trial Examiner's Recommended Decision, and to the Trial Examiner's Failure to Include Proposed Findings and Conclusions Requested by the Respondents.***

2. Said respondents except to the statement contained in the paragraph headed "Jurisdictional Averments" on page 4 of the Trial Examiner's recommended decision to the effect that all essential jurisdictional averments, including public interest, are "factually pleaded" in the amended complaint in this proceeding, for the reason that said amended complaint purports to plead the existence of public interest, not factually but as a conclusion.

1403 3. Said respondents except to the statement contained in the paragraph headed "Jurisdictional Averments" on page 4 of the Trial Examiner's recommended decision to the effect that averments in the amended complaint as to "the business each respondent was engaged in" were "factually pleaded", if, by the term "factually pleaded" the Trial Examiner meant that the averments of the amended complaint with regard to the business each respondent was engaged in were *accurately* pleaded. The Trial Examiner's recommended findings contained in "PARAGRAPH ONE:—Description of Respondents", sub-paragraphs (1) to (29), both inclusive (p. 27-35 of his recommended decision), accurately describe the business each respondent was engaged in, and to the extent that the amended complaint differs from said recommended findings contained in said
1404 "PARAGRAPH ONE:—Description of Respondents" subparagraphs (1) to (29), it does not accurately aver the business each respondent was engaged in.

4. Said respondents except to the following language contained in the 9th through 13th lines of the paragraph headed "STATEMENT OF STALE AND UNRELATED ISSUES IN COUNT I", on page 12 of the Trial Examiner's recommended decision, viz: "the objective of the conspiracy

Exceptions of Certain Respondents to the Trial Examiner's Recommended Decision, and to the Trial Examiner's Failure to Include Proposed Findings and Conclusions Requested by the Respondents.

1405

being effected by the common use of a price fixing formula by which identical delivered price quotations, terms and conditions of sale for chain and chain products in the United States are fixed and maintained", for the following reasons: (i) That if the Trial Examiner intended, by reference back to the word "admitted" in the 6th line of said paragraph to imply that the respondents, or any of them had admitted any of the matters set forth in the above quoted words, the record discloses no such admission; and (ii) That if the Trial Examiner intended said quoted words as a recommended finding of fact or a conclusion, or both, the same are not supported by the record, nor is any citation to the record given in support thereof.

1406

5. Said respondents except to the following statement appearing in the first three lines under the heading: "FINDINGS OF FACT ON MATTERS EMBRACED IN MOTIONS", on page 13 of the Trial Examiner's recommended decision, viz:—"The related facts disclosed by the evidence conform to the allegations of the complaint in the previous stated respects * * *", for the reason that, among the allegations of the complaint previously described, and apparently referred to by the Examiner, is the language quoted and excepted to in Paragraph 4 of these exceptions and, upon the whole record, said language is not supported by the evidence.

1407

NOTE: While the respondents who are parties to the exceptions herein contained do not except herein or hereby to that portion of the Trial Examiner's recommended decision commencing with "PARAGRAPH ONE" on page 13, and continuing to and including the first two lines at the top of page 25, certain of said

1408

respondents (namely, those designated therein as the "licensee group") are filing separate exceptions with respect to said portion of the Trial Examiner's recommended decision. The remainder of the respondents (i.e. those other than the said so-called "licensee group") hereby join in said exceptions filed by said "licensee group" to the extent necessary to prevent their failure to except from being taken as an admission of the accuracy, completeness and/or validity of said portion of the Trial Examiner's recommended decision in the event that the Commission should decide adversely to the Trial Examiner's recommended decision in respect of those motions, which the Trial Examiner recommended that the Commission grant.

1409

6. Said respondents except to the words "or the over-all conspiracy" contained in the last line of the first paragraph under the heading "DISPOSITION OF REMAINING MOTIONS" on page 25 of the Trial Examiner's recommended decision, for the reason that, upon the whole record, no conspiracy, over-all or otherwise, existed among the respondents or any of them.

7. Said respondents except to the second paragraph under the heading "DISPOSITION OF REMAINING MOTIONS" on page 25 of the Trial Examiner's recommended decision, and to each and every part of said paragraph, for the following reasons: (i) that, upon the whole record, there was no "unlawful enterprise" engaged in by the respondent Institute and/or its members; (ii) That there is no evidence that any respondent knew of any "unlawful enterprise"; (iii) That the authorities cited do not support the conclusions set forth in said paragraph, and (iv) that, upon

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the whole record, the motions mentioned in said paragraph should be granted.

8. Said respondents except to the last paragraph on page 25 of the Trial Examiner's recommended decision, and to each and every part of said paragraph for the same reasons as those designated (i) to (iv), inclusive, in paragraph 7 of these Exceptions.

9. Said respondents except to the paragraph at the top of page 26 of the Trial Examiner's recommended decision and to each and every part of said paragraph, for the reasons: (i) that, upon the whole record, the evidence does not establish the existence of any conspiracy, and (ii) that neither upon the whole record, nor upon the record as it would be with the exhibits and testimony other than the exhibits prepared or written by Columbus McKinnon disregarded, does the evidence connect Columbus McKinnon with any conspiracy.

1412

10. Said respondents except to the characterization of the evidence described in the first sentence of the second paragraph on page 26 of the Trial Examiner's recommended decision as "evidence in support of the overall conspiracy charged in Count I" of the amended complaint for the reason that such evidence does not support such charge.

1413

11. Said respondents except to the last sentence of said second paragraph on page 26 of the Trial Examiner's recommended decision for the reason that no decision of the Supreme Court, recent or otherwise, renders immaterial any of the evidence offered in this proceeding by the respondents, and all of such evidence is competent and material and relevant to the issues raised by the pleadings.

1414 *Exceptions of Certain Respondents to the Trial Examiner's Recommended Decision, and to the Trial Examiner's Failure to Include Proposed Findings and Conclusions Requested by the Respondents.*

COUNT 1

12. Said respondents except to the Trial Examiner's failure to include, following the second paragraph on page 36 of his recommended decision, a paragraph of the proposed findings requested by the respondents, appearing at R. 3124-25, and reading as follows:

> "Each of the foregoing types of chain had its own separate history of manufacturing and marketing de-
1415 velopment as hereinafter more fully set forth and to that extent constituted a wholly separate industry."

Said proposed finding is supported by substantial evidence (*Welded chain:* R. 620, 989, 1477; *Weldless chain:* R. 1274, 1257-58, 1260, 1261, 1262, 1263, 1264, 1265, 1001, 1003, 1603, 1665; *Sash & kindred chain:* R. 1258, 2263, 2244, 2261, 2263-64, 2265-66, 2245, 2246-47, 1692, 1016, 1271; *Tire Chain:* R. 1498, 1502, 1505, 1513, 973, 1991, 1669, 1527, 1920, 2300, 622, 2214, 2215, 1297, 1501, 1998, 2149); and there is no evidence to the contrary. It is relevant and material to the issues since it tends to explain why there were three distinct types of delivered price methods of selling in the chain industry as a whole and tends to rebut alleged inferences of collusion in the establishment and
1416 continued use of such delivered price methods.

13. Said respondents except to the statement in the last three lines of the paragraph headed "COMPETITION:" on page 37 of the Trial Examiner's recommended decision that "* * * were it not for the price obstructions hereinafter pointed out [each respondent manufacturer] would be in free and open competition with its natural competi-

1417

tors" for the reasons: (i) that, upon the whole record, there were no "price obstructions" shown in this proceeding and (ii) that the respondent manufacturers were in free, open and active competition with each other, as to price and otherwise, at all times (R. 875-76, 1429-33, 1838-41, 1855, 1898-1904, 2274, 2283, 1405, 1435-38, 1411-22, 1455-57, 1593-94, 1640-43, 1647-49, 1833-38, 2190, 2253, 2274, 1053-55, 1342, 1766, 2018, 2281, Res. Ex. 56A & B, R. 1058-60, 1035, 1053, 1036, 2245-46, 2264, 2266-68, 1037, 1303, 1307, 1606-13, 1629, 1712-15, 1876, 1938, 2011-12).

1418

14. Said respondents except to the failure of the Trial Examiner to include, in connection with his mention of the Institute's statistical program and tire chain specifications program at the bottom of page 37 and top of page 38 of his recommended decision, the complete proposed findings requested by the respondents upon said subjects, to wit, the full paragraph of said findings appearing at the bottom of R. 3126 and the first paragraph at the top of R. 3127. Record references in support of said proposed findings are contained therein at the record pages cited (R. 3126-27), and said proposed findings are relevant and material to the issues in this proceeding since they relate to charges in the complaint pertaining to exchanging of information among the respondents and pertaining to specification for tire chains.

1419

15. Said respondents except to the statement contained in "PARAGRAPH THREE: The chain Institute", on pages 37 and 38 of the Trial Examiner's recommended decision, that "The Institute has carried on * * * other activities hereinafter referred to", to the extent that this statement is intended to refer to any statement, finding or conclusion

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contained in the Trial Examiner's recommended decision to which exception is hereinafter taken.

16. Said respondents except to the language of the heading appearing immediately after the words "PARAGRAPH FOUR" on page 38 of the Trial Examiner's recommended decision, viz.: "The Trade Practice Price Formulae Adhered to by Respondents, Supplemented by Tacit Agreements and Understandings", for the reasons: (i) that the record does not reveal the existence of any "Trade Practice Price Formulae"; (ii) that, if the Trial Examiner meant by those words the delivered price methods of selling used in the various branches of the chain industry, the language quoted is not fairly descriptive but inflammatory and misleading; and (iii) that the record discloses no "Tacit" (or other) "Agreements" or "Understandings". To the extent that the language excepted to in this paragraph 16 is intended merely as a summary or heading describing the subsequent proposed findings and conclusions of the Trial Examiner, it is further excepted to for the same reasons as are hereinafter set forth in connection with specific exceptions to such proposed findings and conclusions.

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17. Said respondents except to the failure of the Trial Examiner to include, between the first and second sentences of the paragraph headed "1. Price Leadership" on page 38 of his recommended decision, the proposed finding requested by the respondents (R. 3133, first paragraph on the page) to the effect that Respondent American was one of the first respondent manufacturers to enter the field. This fact was stipulated (R. 613), and is relevant and material as one of a number of factors tending to prove

Exceptions of Certain Respondents to the Trial Examiner's Recommended Decision, and to the Trial Examiner's Failure to Include Proposed Findings and Conclusions Requested by the Respondents. 1423

that any price leadership was the result of natural economic causes and not collusion.

18. Said respondents except to the failure of the Trial Examiner to include, between the third and fourth sentences of said paragraph headed "1. PRICE LEADERSHIP" on page 38 of his recommended decision, the proposed finding requested by the respondents (R. 3133, at end of first paragraph on page) to the effect that Respondent American had a policy of keeping its prices consistent with 1424
its costs. This proposed finding requested by respondents is supported by substantial evidence (R. 1332-36) and there is no evidence to the contrary. It is relevant and material in further support of the fact that any price leadership was economic and not collusive.

19. Said respondents except to the failure of the Trial Examiner to include, between the fifth and sixth sentences of said paragraph headed "1. PRICE LEADERSHIP" on page 38 of his recommended decision, the proposed finding requested by the respondents (R. 3134) to the effect that the reason respondent American mailed its new price lists or discount sheets to the other respondent manufacturers contemporaneously with the mailing of them to its jobber customers was that all the other respondent manufacturers 1425
were customers of American and purchased chain of various types from it at one time or another (R. 1110-15, 1334-35, 1446), and that, although the general practice of American was to mail these new price lists or discount sheets to the other respondent manufacturers at the same time that they were mailed to American's jobber customers, on some occasions some of the other respondent manufacturers have received these new published prices or discounts from

friendly jobbers before receiving them from American (R. 1110, 1750). These proposed findings, requested by respondents, are supported by substantial evidence (see record citations above), and are relevant and material as further evidence that any price leadership was economic and not collusive.

20. Said respondents except to the statement in the first two lines at the top of page 39 of the Trial Examiner's
1427 recommended decision to the effect that respondent manufacturers other than American transmitted copies of their new price lists and discount sheets to each other, for the reasons: (i) the citations to the record given by the Trial Examiner in support of this statement show only that certain of the respondent manufacturers sent their new price lists and discount sheets to their competitors and not that all of them did this; (ii) the evidence shows that certain other respondent manufacturers did not send their price lists and discount sheets to their competitors (R. 1114-15, 1446, 2249, 2273-74, 2281); (iii) as to the policy of still other respondent manufacturers in this regard the record is silent; hence (iv) the only supportable finding on the subject would be that some, but not all, of the respondent manufacturers sent their new price lists and
1428 discount sheets to their competitors at the time they sent them to their jobber customers.

21. Said respondents except to the Trial Examiner's failure to include in his recommended decision, immediately following the figure "60" at the end of the second line from the top of page 39, the following proposed finding requested by the respondents (R. 3134):

Exceptions of Certain Respondents to the Trial Examiner's Recommended Decision, and to the Trial Examiner's Failure to Include Proposed Findings and Conclusions Requested by the Respondents.

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"American has never informed its competitors of price changes it was going to make, prior to distributing these new price sheets (R. 1109-10, 1332, 1335)."

The above finding is supported by substantial evidence (citations above) and is not negatived by any credible evidence.

22. Said respondents except to the statement in the third and fourth lines on page 39 of the Trial Examiner's recommended decision that "Since January 1937 there has been only one decline in the published prices in the chain industry" for the reasons: (i) that in support of said statement the Trial Examiner cites R. 1218, but a reading of the complete colloquy between witness and counsel (R. 1217-20) shows that both the witness (R. 1217, line 19), and counsel for the complaint (R. 1219, lines 11 and 12) were talking only about welded chain and not the whole chain industry; and (ii) the price lists and discount sheets which are in evidence show the following declines in published prices since 1935 (an increase in published discounts being, of course, equivalent to a decline in published prices):

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Welded Chain: Decline on October 1, 1938 (Compare Com. Ex. 480-B and 481 with 484-B and 485).

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Weldless Chain: Decline on Aug. 26, 1935 (Compare Com. Ex. 1441-C with 1442-C); Aug. 30, 1935 (Compare Com. Ex. 1442-C with 1443-C); Jan. 3, 1939 (Compare Com. Ex. 512-B with 513-B); and July 27, 1939 (Compare Com. Ex. 513-B & C with 514-B & C).

1432 ***Exceptions of Certain Respondents to the Trial Examiner's Recommended Decision, and to the Trial Examiner's Failure to Include Proposed Findings and Conclusions Requested by the Respondents.***

Tire Chain: Decline on June 1, 1938 (Compare Com. Ex. 466-C and 467-B with 468-G); and May 15, 1939 (Compare Com. Ex. 468-G with 469-F).

Moreover, this bald statement by the Trial Examiner ignores the fact that during the depression, published prices and discounts were not being maintained but were being cut in a series of price wars (R. 875-76, 1058-60, 1035, 1036, 2245-46, 2266-68, 1037, 1303, 1606-13), thus producing
1433 many declines in actual selling prices beyond those in published prices.

23. Said respondents except to the failure of the Trial Examiner to include after the figure "62" in the eighth line from the top of page 39 of his recommended decision, the proposed finding requested by the respondents beginning at the top of R. 3135 and running to the end of the first full paragraph on that page, reading as follows:

> "Except possibly with respect to sash and kindred chain, no other manufacturer can sell at a price higher than that published by American (R. 1148, 1583, 1750-1, 2249), and American's prices were at no time higher than justified by cost considerations (R. 1336, 1750, 1869, 2272) and were sometimes lower than justified
> 1434 by costs (R. 1328-30). The price lists in evidence show considerable variation in published prices between Turner & Seymour and American.
>
> "The recognition of respondent American as a price leader by the other respondents has been as a result of American's natural economic position in the chain industry and not as a result of any agreement or understanding."

Exceptions of Certain Respondents to the Trial Examiner's Recommended Decision, and to the Trial Examiner's Failure to Include Proposed Findings and Conclusions Requested by the Respondents.

1435

Said proposed finding requested by respondents is supported by evidence (cited above) or as a clear inference from the evidence, and is relevant and material as proof that any price leadership in the chain industry has been economic and not collusive.

24. Said respondents except to the paragraph constituting the last two lines on page 39 and the first two lines on page 40 of the Trial Examiner's recommended decision that "Prices and discounts established by respondent American were the result of understandings with other respondent manufacturers as hereinafter set forth", for the reason that, upon the whole record, there were no such understandings.

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25. Said respondents except to the action of the Trial Examiner in disregarding evidence summarized in footnote 65 on pages 40 and 41 of his recommended decision, and further except to the Trial Examiner's failure to consider such evidence and, upon such consideration, to include certain proposed findings requested by respondents, to wit, the first two paragraphs of respondents' proposed findings under the heading "(d) Uniformity of Published Prices" appearing at R. 3135 and 3136, and reading as follows:

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"(d) *Uniformity of Published Prices.* The respondent manufacturers' published prices and published discounts (except the published discounts of Russell and Turner & Seymour have been generally uniform at any one particular time (R. 872-5)). These published prices have not remained static for any long period of time, however, but have changed frequently during

1438 *Exceptions of Certain Respondents to the Trial Examiner's Recommended Decision, and to the Trial Examiner's Failure to Include Proposed Findings and Conclusions Requested by the Respondents.*

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the period covered by the evidence in this proceeding (Com. Ex. 464-875, 968-1210, 1268-1313, 1355-1567, 1580-1622).

"This uniformity of published prices has resulted from the fact that all types of chain are homogeneous articles. With respect to welded chain, weldless chain and sash and kindred chain it is not possible to distinguish between the product of one manufacturer and the product of another manufacturer, once the chain
1439 has been removed from its container (R. 1159, 2144, 2276). No buyer will pay more for welded, weldless or sash and kindred chain made by one manufacturer than for that made by another (R. 1034, 1035, 2144). Buyers of this type of chain are well informed as to the prices of all manufacturers (R. 1160). With respect to tire chains the situation is different only to the extent that extensive advertising by some manufacturers (R. 1036, 1289-91) has created consumer preference for their brands and has enabled them to publish higher prices than the manufacturers of non-advertised brands (R. 1036, 2153); although one unpatented tire chain is about as good as another (R. 1302)."

1440 The reasons assigned by the Trial Examiner in his said footnote 65 for disregarding the evidence in question are not valid, because (i) the evidence disregarded explains why published price uniformity could and would occur in the face of possible cost variations; (ii) there is no "certainty" that there were any cost variations of significance among the respondent manufacturers, for the evidence on the point is completely negative—the only witness on the

Exceptions of Certain Respondents to the Trial Examiner's Recommended Decision, and to the Trial Examiner's Failure to Include Proposed Findings and Conclusions Requested by the Respondents.

1441

subject was merely guessing, although he thought that the costs of all chain manufacturers were pretty much the same (R. 1869-71); (iii) the whole record, as stated previously in these exceptions, does not support the statement of the Trial Examiner (second and third lines from bottom of page 40) that American established prices pursuant to previous "understandings"; (iv) uniformity of action or of prices is not necessarily evidence of collusion, and certainly furnishes no ground for disregarding evidence which would negative any inference of collusion (it is hardly proper to disregard evidence on the basis of a conclusion which the excluded evidence would itself make invalid); (v) awareness by competitors that other competitors are following a trade custom or otherwise following a uniform course of action can hardly be avoided in an open competitive market and is not evidence of collusion; (vi) there was no "price fixation"; rather there was active price competition (R. 1058-60, 1035, 1053, 1036, 2245-46, 2264, 2266-68, 1037, 1303, 1307, 1606-13, 1629, 1712-15, 1876, 1938, 2011-12); and (vii) the cases cited by the Trial Examiner (footnote 65, p. 41) do not support his conclusion that the evidence in question should be disregarded.

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26. Said respondents except to the language of the two headings appearing on page 40 of the Trial Examiner's recommended decision reading as follows:

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"2. Understandings as to Future Prices and Price Maintenance Assistance Given by Respondent Merriman.

"A. Understandings as to Future Prices."

1444 *Exceptions of Certain Respondents to the Trial Examiner's Recommended Decision, and to the Trial Examiner's Failure to Include Proposed Findings and Conclusions Requested by the Respondents.*

for the reasons (i) that, upon the whole record, there were no understandings as to prices, future or otherwise; and (ii) that, upon the whole record, there was no "price maintenance assistance" given by respondent Merriman.

27. Said respondents except to the failure of the Trial Examiner to include, between the two paragraphs on page 41 of his recommended decision, the proposed finding requested by the respondents, appearing at R. 3130 and
1445 reading as follows:

> "Respondent Merriman has had no *function*, control or authority whatsoever in connection with the prices of chain and chain products *and has never attempted to exercise any such functions, control or authority* (R. 1144, 1342, 1552, 1587, 1623-4, 1646, 1765-6, 2017, 2071-2, 2166-7)."

Said proposed finding requested by respondents is supported by evidence (citations above) and is directly material to the subject of Merriman's activities. Although the Trial Examiner included part of the above finding on page 41 of his recommended decision, he omitted the parts which are italicized in the above quotation.

1446 28. Said respondents except to the statement in the fourth and fifth lines of the second paragraph on page 41 of the Trial Examiner's recommended decision that respondent Merriman "went through the mills of American 'at frequent intervals'", for the reason that the testimony of Merriman on the subject at the pages cited by the Trial Examiner in support of this statement (R. 2055-62) shows only the following (R. 2057): "I went through the mills of the *American Steel & Wire Company* at frequent intervals".

Exceptions of Certain Respondents to the Trial Examiner's Recommended Decision, and to the Trial Examiner's Failure to Include Proposed Findings and Conclusions Requested by the Respondents. 1447

The American Steel & Wire Company was Merriman's former employer and is not a manufacturer of chain nor a respondent in this proceeding, nor is it connected in any way with respondent American.

29. Said respondents except to the statement contained in the 14th to 18th line from the top of page 42 of the Trial Examiner's recommended decision that "Other respondents testified that there were 'lot of discussions' during 'formal meetings' of increased costs of labor, materials and freight rates *with relation to published prices*" (italics are the Trial Examiner's), for the reasons (i) that in support of said statement the Trial Examiner cites R. 1330-1, 1180-10 and 1871, and nothing on R. 1180-10 or 1871 supports the italicized portion of the Trial Examiner's statement, while the only reference to the subject on R. 1330-1 is the following testimony by the witness Kirkpatrick at R. 1331: 1448

> "Q. Were there any discussions then with competitors at these Institute meetings as to the price level in relation to the cost, that is, the level of published prices?
>
> "A. Well, some of them would say they didn't know how long they could stand it, and there would be other remarks that, 'My bank account is getting awfully low,' and, 'Baby can't have another pair of shoes,' and what not. That was about the line of the conversations." 1449

Other testimony of the witness Kirkpatrick (R. 1332-36, 1366-67) completely negatives any possible inference that the discussions of costs referred to were part of any agreements or understandings to fix prices.

1450 *Exceptions of Certain Respondents to the Trial Examiner's Recommended Decision, and to the Trial Examiner's Failure to Include Proposed Findings and Conclusions Requested by the Respondents.*

30. Said respondents except to the statement contained in the 18th and following lines on page 42 of the Trial Examiner's recommended decision reading as follows:

> "The evidence fairly establishes and it is so found as a fact, that current prices were discussed while the members were at Institute meetings, and that before and after the formal meetings were convened and adjourned, present and future prices were discussed and understandings arrived at with reference to con-
1451 tinuance of, or changes in, current prices, which understandings were reflected in price lists thereafter issued by American."

(i) There is no evidence to establish that current prices were discussed while the members were at Institute meetings. The evidence clearly shows that the only discussion of prices at Institute meetings was with respect to contentions made by customers with respect to off-list sales in past transactions (R. 1366-7, 1469, 2071-2, 2106).

(ii) There is no evidence to show that future prices were discussed before or after formal meetings were convened or adjourned. Again the evidence shows that such discussions were confined to past transactions (R. 1096-8,
1452 1107-8, 1331-5, 1366-7, 1589).

(iii) There is no evidence to show that any understandings were arrived at during discussions before, after or during formal meetings. On the contrary, there is a great deal of specific testimony that there were no such understandings (R. 1108, 1330, 1332, 1335, 1364-7, 1588-9, 2248, 2251-2, 2255, 2271-2).

(iv) Understandings as to continuance of or changes in current prices could not have been reflected in price

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lists thereafter issued by respondent American inasmuch as there were no such understandings.

(v) The conclusion expressed by the Trial Examiner is not supported by the references in his footnote 79 beginning on page 42 of the Recommended Decision. Commission's Exhibit 91 refers solely to discussions of past and closed transactions. This letter was merely a request from Mr. Kirkpatrick to his subordinate to send him information as to price weakening in order that he would have instances of past transactions to discuss. This is amply demonstrated by Mr. Kirkpatrick's testimony as to what he meant by "price stabilization" (R. 1328-30, 1463-4).

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(vi) Commission's Exhibit 87 is a letter from a subordinate of Mr. Kirkpatrick who never attended any meeting of the Institute (R. 1370) so that he must have been referring to agreements within the company. Any possible inferences of collusion which might be drawn from this ambiguous language are completely negatived by the uncontradicted testimony of unimpeached witnesses that there were no agreements or understandings as to prices (R. 1108, 1330, 1332, 1335, 1364-7, 1588-9, 2248, 2251-2, 2255, 2271-2).

(vii) Witness Bond's testimony at R. 1097 is explained by his other testimony at R. 1096-8 which shows clearly that when he talked of "the price structure within the industry" he was referring to discussions of past and closed transactions.

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(viii) The points listed in the last paragraph of footnote 79 (p. 44) do *not* show that current prices were maintained by agreement or that price charges resulted from agreement, because:

1456 *Exceptions of Certain Respondents to the Trial Examiner's Recommended Decision, and to the Trial Examiner's Failure to Include Proposed Findings and Conclusions Requested by the Respondents.*

(a) The discussions of "price cutting" were for the purpose of checking on the accuracy of statements made by buyers, for certain buyers were continually attempting to obtain an additional discount by untruthfully stating that a competitor had offered it (R. 1373, 1978, 2107). The respondents did not intend these conversations to lead to any agreements with respect to future action (R. 1102-3, 1321, 1978-9), and as a matter of fact these conversations did not have any effect on continued price cut-
1457 ting (R. 1101-3, 1318, 1320-1, 1607).

(b) It has already been shown that the evidence does not support the statement that there were discussions before, during or after the formal Institute meetings with respect to present or future prices.

(c) The prompt adoption of price changes announced by American, by the other respondent manufacturers, cannot be taken as any indication of prior agreement in view of the position of American as a price leader by natural economic circumstances and not by agreement (R. 613) and the clearly established facts that no other manufacturer could sell at a price higher than that published by American (R. 1034-5, 1054, 1583, 1751, 2144, 2249), and that American's prices were at no time higher than justi-
1458 fied by cost considerations (R. 1336, 1750, 1869, 2272) and were sometimes lower than justified by costs (R. 1328-30).

(d) As has been pointed out (exception 20) *all* respondent manufacturers did *not* send their price lists to *all* other respondent manufacturers. It was clearly shown that the reason for such transmission of revised price lists was principally to keep the other manufacturers *as customers* informed of prices in effect.

Exceptions of Certain Respondents to the Trial Examiner's Recommended Decision, and to the Trial Examiner's Failure to Include Proposed Findings and Conclusions Requested by the Respondents.

1459

31. Said respondents except to the statement contained as part of footnote 79 near the top of page 44 of the Trial Examiner's recommended decision to the effect that the letters of George J. Campbell, Sr., are entitled to some evidentiary value and that (although disregarded by the Trial Examiner) they "strongly tend to establish price agreements at Institute meetings", for the reasons that (i) said letters are not entitled to any evidentiary value in the face of the fact that Campbell, Sr., was dead and not available to testify or be cross-examined, plus the fact (found by the Examiner, pp. 43-44) that some of Campbell, Sr.'s, statements in his letters were "conclusively shown to have been erroneous", plus the fact that he was shown to have had a motive for making misstatements in his letters to his sales representatives, namely, to stiffen their backbones to resist cut price requests from customers by making it appear that Campbell, Sr. was involved in price agreements with his competitors which would eventually stop the price-cutting (R. 2160-63); and (ii) that said letters do not tend even slightly to establish price agreements at Institute meetings or elsewhere, nor do they tend to establish anything "strongly" except that Mr. Campbell, Sr. had a vivid imagination.

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32. Said respondents except to heading "B" at the top of page 43 of the Trial Examiner's recommended decision reading: "The Price Maintenance Assistance Given by Respondent Merriman", for the reasons (i) that there was no "price maintenance" and (ii) that respondent Merriman had nothing to do with price maintenance or prices (R. 2054, 2067, 2071-72, 2092, 1471, Com. Ex. 212, 2084-85, 1630, 1712, 1921, 2072-73, 1226, 2075, 2077, 1591, 2190, 1116, 1225, 2076, 1943, 1978, 2076, 2103).

1462 *Exceptions of Certain Respondents to the Trial Examiner's Recommended Decision, and to the Trial Examiner's Failure to Include Proposed Findings and Conclusions Requested by the Respondents.*

33. Said respondents except to the statement on page 44 of the Trial Examiner's recommended decision that "prior to the appointment of Mr. Merriman as managing director the Institute had experienced 'a hard time'", for the reason that no evidence in support of said statement appears at R. 2089 cited by the Trial Examiner in support of it and the respondents are unable to find any evidence in the record in support of said statement.

1463 34. Said respondents except to the following statement of the Trial Examiner beginning at page 44, line 4, of the recommended decision:

> "There had been, and were then continuing, price wars, largely confined to the depression years, and to the sale of tire chains (not to jobbers, the usual sales channel) but to automotive chains and chain stores such as Sears-Roebuck who received lower prices than the jobbers, the cut in prices being reflected in higher discounts which at times amounted to as much as 80 percent of the published price. There had also been cutting of prices (failure to maintain the published prices and discounts) to the jobbers; resulting in part from the lower prices given the chain stores which
> 1464 were likewise reflected in increased discounts [82]."

(i) The statement that price wars were "largely confined to the depression years" is inaccurate, for the evidence shows that there was extensive price cutting at all times and on all types of chain (R. 1035-6, 1038-55, 1058-62, 1303-4, 1327-9, 1606-13, 1629-33, 1818-9, 1938-41, 2267-8).

(ii) The price wars were not "largely confined to the sale of tire chains to automotive chains and chain stores".

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This is indicated by the testimony just cited. The references in footnote 82 do not support this statement. At R. 2010-13, the testimony was by Mr. Boucher of respondent Pyrene which manufactured only tire chains and no welded or weldless chain. At R. 1876, witness Cull's testimony was limited to tire chains because the line of questioning was so limited, and at the bottom of R. 1876 and on R. 1877 Mr. Cull clearly indicated that price cutting by his company was not confined to chain stores. In addition to the existence of continual price cutting on tire chains (R. 1058-60), constant price cutting was emphatically shown with respect to welded chain (R. 1035, 1053), weldless chain (R. 1036, 1053) and sash and kindred chain (R. 2245-6, 2264, 2266-8).

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35. Said respondents except to the following statement of the Trial Examiner on page 46, lines 1 through 3, of the recommended decision: "This was understood by one respondent to be 'part of his job' [85] ", for the reason that it is misleading to refer to this "understanding" by one Institute member without stating that a majority of other members, and Mr. Merriman himself, did *not* consider this checking on reported price cutting to be a part of his job (R. 1226, 2075, 2077).

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36. Said respondents except to the statement on page 46 of the Trial Examiner's recommended decision that "The price leadership plan adopted and followed by the members was known to Merriman * * * ", for the reasons (i) that there was no "price leadership plan", as has been shown in previous paragraphs of these exceptions; and (ii) that Merriman's testimony shows that he could not have known of any such "plan" (R. 2067, 2071-72).

1468 ***Exceptions of Certain Respondents to the Trial Examiner's Recommended Decision, and to the Trial Examiner's Failure to Include Proposed Findings and Conclusions Requested by the Respondents.***

37. Said respondents except to footnote 87 on page 46 of the Trial Examiner's recommended decision, for the reasons (i) that Merriman's testimony showed that he could not have known of any such "plan" (R. 2067, 2071-72); (ii) that there was in fact no such "plan"; and (iii) that the Trial Examiner's conclusion in said footnote is unsupported by any evidence.

38. Said respondents except to the statement on pages
1469 46 and 47 of the Trial Examiner's recommended decision to the effect that Merriman's personal philosophy with respect to selling at published prices was "known to the officers and members of the Institute at the time he was employed", for the reason that the Trial Examiner cites no evidence in support of such statement and in fact there is none.

39. Said respondents except to the statement of the Trial Examiner on page 47, line 8, of his recommended decision to the effect that Merriman aided members "in detecting price cutters in their midst" for the reason that, if this statement refers to Mr. Merriman's telephone inquiries to verify the accuracy of buyers' representations to salesmen, the purpose of such calls was to check up on
1470 the truthfulness of the buyers (R. 1943, 1978, 2076) which is quite different from "detecting price cutters". Certain buyers were continually attempting to obtain an additional discount by stating that it was being offered by a competitor (R. 1373, 1978, 2107). The Robinson-Patman Act requirement that such price cutting be restricted to meeting competitors' lower prices in good faith led to some of this checking (R. 1319, 1337), and presents a complete legal

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justification therefor (FTC v. A. E. Staley Mfg. Co., 324 U. S. 746, 759).

40. Said respondents except to the following statement of the Trial Examiner on page 47, beginning at line 9, of the recommended decision:

> "* * * he (Merriman) contributed much to, and played an important part in furthering the plan designed to accomplish price uniformity in the chain industry."

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(i) There is no evidence to support the statement that there was any "plan designed to accomplish price uniformity in the chain industry". The evidence in the record, which the Trial Examiner erroneously disregarded (see footnote 65 at page 40 of the Recommended Decision) shows that any price uniformity arose from a natural competitive situation and not from any "plan".

(ii) There is substantial uncontradicted testimony to the effect that neither Mr. Merriman's speeches nor his telephone inquiries had any effect in causing price uniformity or discouraging off-list price cutting (R. 1630, 1712, 1878-9, 1938). The lack of any such purpose on the part of Merriman is clearly shown by his testimony, particularly at R. 2103.

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41. Said respondents except to the failure of the Trial Examiner to include at the end of page 47 of his recommended decision the paragraphs of the proposed findings requested by the respondents beginning with the paragraph which starts at the bottom of R. 3127 and including

1474 *Exceptions of Certain Respondents to the Trial Examiner's Recommended Decision, and to the Trial Examiner's Failure to Include Proposed Findings and Conclusions Requested by the Respondents.*

all of the said proposed findings on R. 3128 et seq., to and including paragraph (f) on R. 3139, for the reasons (i) said proposed findings are supported by substantial evidence cited therein, (ii) said findings are material and relevant to the subject matters contained in PARAGRAPH FOUR of the Trial Examiner's proposed findings (pp. 38 to 47, inclusive of his recommended decision) and to the charges in the amended complaint; and (iii) the Trial Examiner's proposed findings are not complete without the
1475 inclusion of said proposed findings requested by respondents.

42. Said respondents except to the heading appearing at the top of page 48 of the Trial Examiner's recommended decision reading "3. Basing Point Systems", for the reason that, while the Pittsburgh Plus method of selling welded chain and the freight equalization method of selling weldless chain might conceivably be characterized as "basing point systems", the same is not true of the universal delivered price method of selling tire chains.

43. Said respondents except to the failure of the Trial Examiner to include at the end of paragraph 3 on page 48 of his recommended decision that portion of the proposed
1476 findings requested by respondents beginning with paragraph (g) on R. 3139 and continuing to the end of said paragraph (g) at the top of R. 3141, for the reasons (i) that said proposed findings are supported by substantial evidence therein cited, (ii) said proposed findings are relevant and material to the subject matter of the Trial Examiner's proposed findings in his said paragraph 3 on page 48 of his recommended decision, and (iii) said proposed findings of the Trial Examiner are not complete

Exceptions of Certain Respondents to the Trial Examiner's Recommended Decision, and to the Trial Examiner's Failure to Include Proposed Findings and Conclusions Requested by the Respondents.

1477

without the inclusion of said proposed findings requested by respondents.

44. Said respondents except to the failure of the Trial Examiner to include, immediately preceding paragraph B on page 49 of his recommended decision, PARAGRAPH SIX (a), (b) and (c) of the proposed findings requested by the respondents (R. 3149-53), for the reasons (i) that said proposed findings are supported by substantial evidence as therein cited, (ii) that said proposed findings are relevant and material to the subject matter of the Trial Examiner's proposed findings on the Pittsburgh-Plus method of selling welded chain and to the charges in the amended complaint, and (iii) that the Trial Examiner's proposed findings on said method are not complete without the inclusion of said proposed findings requested by the respondents.

1478

45. Said respondents except to the statement in the last paragraph on page 49 of the Trial Examiner's recommended decision to the effect that Charles Donley was employed in 1933 to compile freight rates on welded chain from Pittsburgh to various destinations "for the purpose of insuring uniformity in computing prices under the Pittsburgh-plus plan," for the reason that the Trial Examiner's citations to the record in purported support of said statement do not support it and there is no evidence in the record in support of said statement.

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46. Said respondents except to the failure of the Trial Examiner to include in the paragraph at the bottom of page 49 of his recommended decision the proposed finding requested by the respondents (R. 3153) that Charles Donley,

1480 *Exceptions of Certain Respondents to the Trial Examiner's Recommended Decision, and to the Trial Examiner's Failure to Include Proposed Findings and Conclusions Requested by the Respondents.*

as an independent traffic consultant, "represents a number of clients in freight rate matters (R. 2343)", for the reason that said proposed finding is supported by substantial evidence as cited above and is relevant and material to the proposed findings of the Trial Examiner on the subject of Charles Donley.

47. Said respondents except to the failure of the Trial Examiner to include in paragraph B appearing on pages 49
1481 and 50 of his recommended decision the proposed finding requested by respondents (R. 3127) that the Donley freight book has no relation to the sale of weldless or tire chain, for the reason that said proposed finding is a self-evident fact and is relevant and material to the issues raised by the pleadings.

48. Said respondents except to the failure of the Trial Examiner to include in Paragraph B on pages 49 and 50 of his recommended decision the proposed findings requested by the respondents appearing on R. 3154, reading as follows:

> "In addition to compiling the so-called Donley freight rate book, Donley has performed such services
> 1482 for the Institute, down to and including the present, as watching for proposed changes in freight rates which would affect the chain industry (R. 2342) and representing the chain industry at rate hearings before the Interstate Commerce Commission (R. 1236, 2338).
>
> "There was no agreement or understanding among the respondents that they would use the Donley freight rate book (R. 2134). It was issued as a matter of

Exceptions of Certain Respondents to the Trial Examiner's Recommended Decision, and to the Trial Examiner's Failure to Include Proposed Findings and Conclusions Requested by the Respondents. 1483

convenience for each of them to use or not use as the individual saw fit (R. 2340). Some members of the Institute did not use the Donley book at all (R. 1681-3, 1705-6, 1886). Other respondents did not use the Donley book exclusively, using both the Donley book and some other freight rate service (R. 1981-3, 2134, 2299). Since the Donley book could be used only in connection with sales of welded chain, it was, of course, never used by respondents Pyrene, St. Pierre, Russell or Turner & Seymour who have never manufactured or sold welded chain." 1484

49. Said respondents except to the Trial Examiner's statements in footnote 98 on page 50 of his recommended decision, reading as follows:

> "Apparently an identical practice was condemned in Triangle Conduit and Cable Co. v. F.T.C. decided May 12, 1948, by U. S. Circuit Court of Appeals, 7th Circuit, 8th Par."

That court did not "condemn" the furnishing of the freight rate service. The court there held merely that in conjunction with all the other facts and circumstances in *that case* the Federal Trade Commission was justified in finding that the freight rate service had been used in conjunction with a price-fixing agreement. A freight rate service was upheld in *Cement Mfrs. Protection Assn.* v. *U. S.*, 268 U. S. 726. 1485

50. Said respondents except to the failure of the Trial Examiner to include, in connection with his proposed finding that "There was no phantom freight in any of the sales of respondents Western, Russell and Turner & Sey-

1486 *Exceptions of Certain Respondents to the Trial Examiner's Recommended Decision, and to the Trial Examiner's Failure to Include Proposed Findings and Conclusions Requested by the Respondents.*

mour" on page 51 of his recommended decision, the fact (included in proposed findings requested by respondents at R. 3157-58) that the use of the freight equalization method of selling weldless chain did not involve the use of phantom freight in *any* of the sales of *any* of the respondent manufacturers. Said fact is supported by citations to the record contained in said proposed findings of the respondents (R. 3157-58), and is material and relevant to the issues in this proceeding regarding the matter of
1487 the freight equalization method of selling weldless chain.

51. Said respondents except to the failure of the Trial Examiner to include, immediately preceding paragraph 6 on page 51 of his recommended decision, the proposed findings requested by the respondents comprising all of PARAGRAPH SEVEN (including subparagraphs (a) to (e), both inclusive, thereof) appearing at R. 3154-61, for the reason that said proposed findings requested by the respondents are supported by substantial evidence cited therein, and are relevant and material to the issues in this proceeding regarding the freight equalization method of selling weldless chain.

52. Said respondents except to the failure of the Trial
1488 Examiner to include, immediately preceding paragraph 7 on page 52 of his recommended decision, the proposed findings requested by the respondents comprising all of PARAGRAPH EIGHT (including subparagraphs (a) to (d), both inclusive, thereof) appearing at R. 3161-65, for the reason that said proposed findings requested by the respondents are supported by substantial evidence cited therein, and are relevant and material to the issues in this

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proceeding regarding the universal delivered price method of selling tire chains.

53. Said respondents except to the heading of paragraph 7, appearing on page 52 of the Trial Examiner's recommended decision, reading as follows: "The Net Price Stabilization Results Obtained Through Planned Concerted Action", for the reasons (i) that, upon the whole record, there is no evidence of any "price stabilization", whether of "net" prices or otherwise, and (ii) that, upon the whole record, there is no evidence of any "planned concerted action".

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54. Said respondents except to the statement of the Trial Examiner on page 52 of his recommended decision, reading as follows (the exception being to the italicized portions only):

> "*Between 80 and 95 percent* of the sales of all the three kinds of chains sold by the respondent members during the period mentioned in the complaint were at uniform prices except during the depression years of 1932, the early part of 1933, 1936 and 1938, when the percentage of uniformity was *somewhat* less."

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The stipulation upon which the above statement was purportedly based is subsequently described and quoted in part on pages 52 and 53 of the Trial Examiner's recommended decision and it shows: (i) that the figure of 80% uniformity mentioned by the examiner was conceded by the respondents as an average figure (except for the depressed periods mentioned); (ii) the figure of 95% uniformity constitutes a mere contention of the attorneys sup-

porting the complaint, not acquiesced in by respondents and hence having no probative value whatsoever; and (iii) the Trial Examiner's statement (purportedly based upon the said stipulation) that, during the depressed periods the percentage of uniformity was "somewhat" less is at variance with the paragraph of said stipulation, quoted near the bottom of page 53 of the recommended decision that, during the depressed periods, the percentage of uniformity was "*considerably*" less. It follows that the words
1493 "Between 80 and 95 percent" in the above statement of the Trial Examiner should read "An average of 80 percent", and the italicized word "somewhat" should read "considerably".

55. Said respondents except to the statement contained in the 12th line from the bottom of page 52 of the Trial Examiner's recommended decision that the invoices which were introduced in evidence were "typical of all" for the reason that the stipulation upon which such statement is purportedly based (R. 872-75) shows that the invoices which were introduced in evidence were typical only of those invoices where the respondents had sold in accordance with their respective published price lists and discount sheets. None of the invoices representing the 20% of
1494 respondents' sales which were at off-list, non-uniform prices (considerably more than 20% in the depressed periods) was introduced in evidence. To state that the invoices introduced in evidence are "typical of all" is, therefore, erroneous, for the invoices introduced in evidence are not typical of the off-list invoices representing an average of 20% of respondents' sales in ordinary times and considerably more than 20% in the depressed periods.

Exceptions of Certain Respondents to the Trial Examiner's Recommended Decision, and to the Trial Examiner's Failure to Include Proposed Findings and Conclusions Requested by the Respondents.

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56. Said respondents except to the failure of the Trial Examiner to include in paragraph 7 on pages 52 and 53 of his recommended decision a proposed finding requested by the respondents (R. 3135) to the effect that respondents Turner & Seymour's and Russell's published discounts were not uniform with those of other respondents. Said proposed finding of the respondents is supported by the stipulation relied upon by the Trial Examiner for his statements on pages 52 and 53 (R. 874) to the effect that respondents Turner & Seymour and Russell followed different selling practices than other respondents, which different selling practices are described in detail in stipulations at R. 634-42. Said proposed finding of the respondents is relevant and material as part of the evidence proving the absence of any price-fixing or other conspiracy.

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57. Said respondents except to the entire "PARAGRAPH FIVE: Public Interest", and to each and every part thereof, appearing on page 54 of the Trial Examiner's recommended decision, for the reason that the conclusions set forth in said PARAGRAPH FIVE are not warranted by the evidence in this proceeding.

58. Said respondents except to the failure of the Trial Examiner to include in his recommended decision the proposed findings requested by the respondents comprising "PARAGRAPH NINE. Public Interest" appearing at R. 3165-67, for the reason that said findings are warranted by the evidence upon the whole record of this proceeding and by the evidence specifically cited in said proposed findings, and are relevant and material to the proceeding and the issues thereof.

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1498 *Exceptions of Certain Respondents to the Trial Examiner's Recommended Decision, and to the Trial Examiner's Failure to Include Proposed Findings and Conclusions Requested by the Respondents.*

59. Said respondents except to the Trial Examiner's action in rejecting "as not the best evidence" or as "not the best and controlling evidence" or as "completely at variance with the convincing and controlling evidence" the evidence described in footnote 106 on page 54 of his recommended decision, for the reasons (i) that such rejected evidence was the testimony under oath of witnesses who were in a position to know, and who knew, the facts of which they testified and who were subject to cross-examination and were cross-examined by counsel supporting the complaint; (ii) that such testimony is not to be regarded as secondary evidence or as not the best evidence under any rule of evidence, but *is* the best evidence; (iii) that the evidence which the Trial Examiner deemed at variance with the disregarded evidence was largely circumstantial evidence which would not be controlling in the face of direct, uncontradicted evidence to the contrary; (iv) that, in fact, the evidence disregarded was not at variance with any other evidence but was merely explanatory thereof and was at variance only with the Trial Examiner's inferences from such other evidence, which inferences are erroneous on the whole record; (v) that Rule 22(c) of the Commission's Rules of Practice requires that all findings, conclusions and orders recommended by the Trial Examiner be based upon the whole record; and (vi) that, upon the whole record, the disregarded evidence should control over the evidence which the Examiner believed to be at variance with it.

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60. Said respondents except to the action of the Trial Examiner in disregarding "as no defense in view of the recent decisions of the courts holding their systematic use unlawful" certain evidence regarding the delivered price

Exceptions of Certain Respondents to the Trial Examiner's Recommended Decision, and to the Trial Examiner's Failure to Include Proposed Findings and Conclusions Requested by the Respondents.

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methods of selling described in footnote 107 on page 54 of his recommended decision, for the reasons (i) that there are no court decisions holding that the systematic use of the methods of selling in question are unlawful; and (ii) that the disregarded evidence is relevant and material to the issues of alleged conspiracy as well as to the issues of alleged price discrimination and there are no court decisions holding that such evidence should be disregarded.

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61. Said respondents except to the action of the Trial Examiner in rejecting "as immaterial" or "as immaterial in the light of recent court rulings (F.T.C. v. Cement Institute decided by the U. S. Supreme Court April 26, 1948, and Triangle Conduit and Cable Co., et al, v. F.T.C. decided May 12, 1948, by U. S. Circuit Court, 7th Circuit)" certain evidence described in footnote 108 on pages 54 and 55 of his recommended decision, for the reasons (i) such evidence is material and relevant to the issues raised by the amended complaint; and (ii) the cases cited merely held that the evidence therein adduced warranted the Commission in finding violations of law, and did not hold that, in making findings, the Commission should reject or disregard evidence of the type here rejected by the Trial Examiner.

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62. With respect to PARAGRAPHS ONE and TWO of Count 2, page 55, of the Trial Examiner's recommended decision, said respondents make the same exceptions as hereinbefore made by them with respect to PARAGRAPHS ONE and Two of the Trial Examiner's recommended findings under Count 1.

1504 *Exceptions of Certain Respondents to the Trial Examiner's Recommended Decision, and to the Trial Examiner's Failure to Include Proposed Findings and Conclusions Requested by the Respondents.*

63. With respect to "PARAGRAPH THREE: A" of Count 2, page 55, of the Trial Examiner's recommended decision, said respondents make the same exceptions as hereinbefore made with respect to subparagraph 4 of Paragraph Four of the Trial Examiner's recommended findings under Count 1, and, in addition said respondents except to the inclusion by reference in said "PARAGRAPH THREE: A" of Count 2 of any and all mention of the Donley Freight book, for the reason that said book can have no relation to the
1505 charges of alleged price discrimination under Count II of the amended complaint.

64. Said respondents except to the failure of the Trial Examiner to include, as part of PARAGRAPH THREE under Count 2 of his recommended decision (pages 55-56), PARAGRAPH SIX, in its entirety, of the proposed findings of fact requested by the respondents (R. 3149-54), for the reasons that said PARAGRAPH SIX is supported by substantial evidence therein cited and states facts essential to a determination of the issues under Count II of the amended complaint regarding the Pittsburgh Plus method of selling welded chain.

65. Said respondents except to the failure of the Trial
1506 Examiner to include in PARAGRAPH THREE under Count 2 of his recommended decision (pages 55-56) subparagraphs (d), (e) and (f) of PARAGRAPH THREE under Count II of the proposed findings requested by the respondents (R. 3173), for the reason that said proposed findings are statements with regard to the complete absence from the record of any evidence from which there could be inferred or found any reasonable possibility of injury to competition from the use of the Pittsburgh Plus method of selling welded chain.

Exceptions of Certain Respondents to the Trial Examiner's Recommended Decision, and to the Trial Examiner's Failure to Include Proposed Findings and Conclusions Requested by the Respondents. 1507

66. With respect to PARAGRAPH FOUR under Count 2 of the Trial Examiner's recommended decision (page 56), said respondents make the same exceptions as hereinbefore made with respect to subparagraph 5 of Paragraph Four of the Trial Examiner's recommended findings under Count 1.

67. Said respondents except to the failure of the Trial Examiner to include, as part of PARAGRAPH FOUR of Count 2 of his recommended decision (p. 56), PARAGRAPH SEVEN, in its entirety, of the proposed findings requested by the respondent (R. 3154-61), for the reason that said PARAGRAPH SEVEN is supported by substantial evidence therein cited and states facts essential to a determination of the issues under Count II of the amended complaint relating to the freight equalization method of selling weldless chain. 1508

68. Said respondents except to the failure of the Trial Examiner to include in PARAGRAPH FOUR of Count 2 of his recommended decision (p. 56) subparagraphs (b) to (f), both inclusive, of PARAGRAPH FOUR under Count II of the proposed findings requested by respondents (R. 3174-75), for the reason that said proposed findings contain statements of ultimate fact, based upon previous proposed findings, as to the freight equalization method of selling weldless chain, and also contain statements with regard to the complete absence from the record of any evidence from which there could be inferred or found any reasonable possibility of injury to competition from the use of said freight equalization method. 1509

69. Said respondents except to PARAGRAPH FIVE of Count 2 of the Trial Examiner's recommended decision (p. 56)

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for the reason that Count II of the amended complaint does not place in issue the universal delivered price method of selling tire chain.

70. Without waiving the exception contained in paragraph 69 above, said respondents make the same exceptions with regard to said PARAGRAPH FIVE of Count 2 of the Trial Examiner's recommended decision (p. 56) as are hereinbefore made with regard to subparagraph 6 of PARAGRAPH FOUR of the Trial Examiner's recommended findings under Count I.

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71. Without waiving the exception contained in paragraph 69 above, said respondents except to the failure of the Trial Examiner to include, as part of his said PARAGRAPH FIVE of Count 2 of his recommended decision (p. 56), PARAGRAPH EIGHT, in its entirety, of Count I (R. 3161-65) and subparagraphs (b) to (f), both inclusive, of Count II (R. 3176-77) of the proposed findings requested by the respondents, for the reason that said proposed findings are either supported by evidence cited therein or are ultimate facts based upon previous proposed findings of fact or are statements with regard to the complete absence from the record of any evidence from which there could be inferred or found any reasonable possibility of injury to competition from the use of the universal delivered price method of selling tire chains, and are relevant and material to the issues (if there be any, which is denied) under Count II of the amended complaint regarding said universal delivered price method.

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72. Said respondents except to the entire second sentence of PARAGRAPH SIX on page 56 of the Trial Examiner's

Exceptions of Certain Respondents to the Trial Examiner's Recommended Decision, and to the Trial Examiner's Failure to Include Proposed Findings and Conclusions Requested by the Respondents.

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recommended decision, for the reasons: (i) that, upon the whole record, there was no evidence of any "agreed" price leadership or any other "plan" adopted or followed by any of the respondents, nor any "agreed plan" that the respondents, or any of them, would adopt the price lists, discount sheets or list extras of respondent American; and (ii) that said second sentence of PARAGRAPH SIX on page 56 of the Trial Examiner's recommended decision is irrelevant to any issue under Count II of the amended complaint which deals solely with issues of alleged price discrimination in alleged violation of the Clayton Act as amended by the Robinson-Patman Act.

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73. Said respondents except to the failure of the Trial Examiner to include in PARAGRAPH SIX (p. 56) of his recommended decision the proposed findings requested by the respondents in PARAGRAPH SIX under Count II (R. 3177-78) of their proposed findings, for the reason that said proposed findings state the complete absence from the record of any evidence from which there could be inferred or found any reasonable possibility of injury to competition from any of respondents' customer discounts.

74. Said respondents except to PARAGRAPHS ONE and Two of the CONCLUSIONS OF LAW (pp. 56-58) and the CONCLUSIONS ON COUNTS 1 AND 2 (p. 58) of the Trial Examiner's recommended decision, both in their entirety and as to each and every part thereof, for the reason that none of the recommended findings or conclusions of alleged fact or law therein contained is supported, on the whole record in this proceeding, by any substantial evidence. Said recommended findings and conclusions are contrary to the substantial evidence in the record of this proceeding.

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1516 *Exceptions of Certain Respondents to the Trial Examiner's Recommended Decision, and to the Trial Examiner's Failure to Include Proposed Findings and Conclusions Requested by the Respondents.*

75. Said respondents except to the failure of the Trial Examiner to include in his recommended decision the proposed findings and conclusions requested by the respondents in PARAGRAPH TEN under Count I (R. 3167-71), PARAGRAPH ELEVEN under Count I (R. 3171), PARAGRAPH SEVEN under Count II (R. 3178-79), and PARAGRAPH EIGHT under Count II (R. 3179-80) of respondent's proposed findings and conclusions, for the reason that said proposed findings and conclusions represent self-evident and inescapable
1517 findings of ultimate fact and conclusions of law based upon the whole record in this proceeding.

76. With regard to the Trial Examiner's "RULINGS ON REQUESTED FINDINGS" set forth on pages 58 to 60 of his recommended decision, said respondents repeat and reaffirm the exceptions hereinbefore contained (i) with respect to the proposed findings and conclusions recommended by the Trial Examiner (whether or not the same represent the allowance by the Trial Examiner of proposed findings or conclusions requested by counsel for the complaint) and (ii) with respect to the Trial Examiner's failure to include proposed findings and conclusions requested by the respondents; and said respondents specifically except to each and every ruling of the Trial Examiner re-
1518 jecting in whole or in part any proposed finding or conclusion requested by the respondents.

77. Said respondents except to the entire proposed findings and conclusions recommended by the Trial Examiner in his recommended decision, pages 27 to 58, both inclusive, and except to the failure of the Trial Examiner to include in his recommended decision, in lieu thereof, all of the proposed findings and conclusions requested by the respondents at R. 3110 to 3180, both inclusive.

Exceptions of Certain Respondents to the Trial Examiner's Recommended Decision, and to the Trial Examiner's Failure to Include Proposed Findings and Conclusions Requested by the Respondents. 1519

78. Said respondents except to the RECOMMENDED ORDER set forth on pages 61 to 65 of the recommended decision of the Trial Examiner (as subsequently corrected by the Trial Examiner by Notice of Corrections dated October 6, 1948), and to each and every paragraph and part of said RECOMMENDED ORDER *except*: (i) the paragraph at the bottom of page 64 granting certain motions to strike, and (ii) the last two paragraphs of the RECOMMENDED ORDER, dismissing the complaint as to respondent McCann and respondents Shirley, Olcott and Nichols. 1520

79. Said respondents except to the failure of the Trial Examiner to include and recommend the proposed order requested by the respondents (R. 3180) dismissing the complaint in its entirety as to all respondents.

80. Said respondents except to the statement contained in the tenth and eleventh lines from the bottom of the first page of the "AMENDMENT TO TRIAL EXAMINER'S RECOMMENDED DECISION", dated September 30, 1948, to the effect that the Institute and its members "were engaged in an unlawful enterprise", for the reason that, upon the whole record in this proceeding, there is no evidence to justify such a statement. 1521

Respectfully submitted,

Washington, D. C.
October 25, 1948

SUMNER S. KITTELLE,
FRAZER F. HILDER,
Attorneys for Respondents.

Filed October 25, 1948.

1522

Exceptions of Respondent, The Turner and Seymour Manufacturing Company, to the Trial Examiner's Recommended Decision.

Respondent, The Turner and Seymour Manufacturing Company joins in the exceptions filed on behalf of itself and on behalf of the other respondents by Sumner S. Kittelle and the firm of Kittelle and Lamb. In addition thereto, said respondent excepts to the following portions of the Trial Examiner's Recommended Decision, as amended, and to the Examiner's failure to include the following proposed findings and conclusions requested under Rule XXI.

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1. Respondent excepts to the statement appearing at page 25 to the effect that the Paragraphs Nine, Ten and Eleven of Count I of the amended complaint should not be dismissed as to respondent, Turner and Seymour, "*for the reason* that sash and kindred chain are weldless chain; that they were both members of the Sash and Kindred Chain Group of the Institute which was part of the Institute, and knew or should have known the Institute and its members were engaged in an unlawful enterprise and continued their membership without protest."

Each of the premises or subordinate facts upon which the conclusion that Paragraphs 8, 9 and 10 of Count I should not be dismissed as to this respondent is based is either entirely unsupported by the evidence, is given a

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significance and meaning which it can not have when contrasted with other facts found and with the evidence, or is contrary to other facts found and to the evidence and, therefore, the conclusion based on these subordinate facts and premises cannot stand.

(a) *The statement that "sash and kindred* chain are weldless chain."

Exceptions of Respondent The Turner and Seymour Manufacturing Company, to the Trial Examiner's Recommended Decision.

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Sash and kindred chain are "weldless" only in the sense that they are not "welded." The Trial Examiner's Findings recognize that "sash and kindred chain" is an entirely distinct class of chain from "weldless chain." For example: at page 36 the Trial Examiner states that the method of making sash and kindred chain differs from that used in making "ordinary weldless chain" (citing R. 610) and that "for a number of years sash and kindred chain was manufactured by companies which did not make any other types of chain and the history and selling practices indicate that this is a separate branch of the chain industry" (citing R. 1258, 2244-5, 2261, 2263). At pages 36 and 37 the Trial Examiner refers to "welded chain, weldless chain, sash and kindred chain and tire chain" and at page 40 he refers to "welded, weldless or sash and kindred chain," recognizing clearly that "sash and kindred chain" and "weldless chain" were two separate and distinct classes of chain. Again, at pages 39 and 48 the Trial Examiner states that this respondent made and sold "only sash and kindred chain."

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On the Trial Examiner's own findings of fact it is clear that "weldless chain" and "sash and kindred chain" are two distinct classes of chain and that the statement that "sash and kindred chain are weldless chain," while true in the same sense that a pigeon is a bird, in view of the other findings of fact, has no significance whatever as the basis for a finding that Paragraphs 8, 9 and 10 of Count 1 should not be dismissed "for the reason that sash and kindred chain are weldless chain."

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(b) *The statement that "they were both members of the Sash and Kindred Chain Group of the Institute, and knew or should have known the Institute and its members were engaged in an unlawful enterprise and continued their membership without protest."*

1528 *Exceptions of Respondent The Turner and Seymour Manufacturing Company, to the Trial Examiner's Recommended Decision.*

There is absolutely no basis in the evidence to support any finding that this respondent "knew or should have known the Institute and its members were engaged in an unlawful conspiracy."

The Trial Examiner has found, at page 27, that:

(1) The Sash and Kindred Chain Group is recognized as a separate and distinct division;

(2) The Sash and Kindred Chain Group holds its meet-
1529 ings infrequently;

(3) No meetings of this Group have been held for several years;

(4) Companies which are members of this Group only do not receive notice of the meetings of the Institute;

(5) Meetings of the Sash and Kindred Chain Group are held separate and apart from the weldless chain group, the welded chain group, and the tire chain group;

(6) Members of the Sash and Kindred Chain Group only do not receive copies of the minutes of meetings of the Institute.

Turner and Seymour was a member of the Sash and Kindred Chain Group only (Finding 17 under Count 1; R.
1530 2270, 2271, Resp. Ex. 52A).

The foregoing specific and detailed findings are obviously irreconcilable with any ultimate finding that Turner and Seymour "knew or should have known the Institute and its members were engaged in an unlawful enterprise and continued their membership without protest."

2. Respondent excepts to the finding contained in Count I, Paragraph One, (17) to the effect that Turner and Sey-

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mour manufactures and sells "the type of weldless chain known as sash and kindred chain," for the reason that sash and kindred chain is a separate type of chain, as indicated by the finding of the Trial Examiner in Paragraph Two that "the principal types of chain involved are welded chain, weldless chain, sash and kindred chain, and tire chain," (Citing R. 609-610); and the finding at page 36 that "the history and selling practices indicate that this is a separate branch of the chain industry" (Citing R. 1258, 2244-5, 2261, 2263); and the finding at page 37 that "sash and kindred chain" is a separate kind of chain from "weldless chain." See also note 65 on page 40 of the Recommended Decision and Findings.

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3. Respondent excepts to the statement, as far as this respondent is concerned, appearing at the end of note 79 (page 44) to the effect that a prior agreement as to maintenance of and changes in price was shown by "the systematic, *pro forma* and prompt adoption of each changed price list as and when issued by American by each of the respondent manufacturers" and by "the prompt transmission by each respondent of its revised price list, to all other respondent manufacturers," because there is no evidence either that this respondent did follow American Chain on price (i.e. net prices) or that it sent its price lists, covering sash and kindred chain only, to all of the other respondent manufacturers. The evidence is directly contrary to this. The Trial Examiner has found, page 39, that "in some instances respondent Turner and Seymour (who manufactured and sold only sash and kindred chains) *published changed price* lists increasing prices without waiting for American (R. 2273)." It was stipulated that The Turner and Seymour Manufacturing Company does not exchange price lists with its competitors (R. 2273) and that it sends

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its price lists only to those of its competitors to whom it sells certain items of chain (R. 2273-4, 2281) at the same time that it sends announcements of price changes to its other customers (R. 2273-4, 2281).

4. This respondent excepts to the finding contained in Count 2, Paragraph Six, that "it is stipulated that the published list prices, published discounts therefrom and published list extras thereon for * * * weldless * * * chain of any one of the respondent manufacturers were as published at the time by all other respondents selling such products" and to the finding that "this resulted from the agreed price leadership plan adopted and followed by all respondents": because:

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(1) Turner and Seymour did not stipulate that its published discounts were the same as those of the other respondent manufacturers (Comm. Ex. 1579, R. 892, R. 896) and Turner and Seymour discounts were not the same as those of American Chain Company (Comm. Ex. 516A-C compared with Comm. Ex. 1042, 1042Z-1). For example, compare the discounts of American Chain Company and of Turner and Seymour on sash chain and on #8 sash chain (Comm. Ex. 810-819, 1043AB, 1050, 1056-8, 1063-70, 1073, 1014Z, 1042-1).

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5. This respondent excepts to the Conclusion of Law contained in Paragraph One that it took part in any combination, conspiracy or planned course of action having the capacity, tendency or effect to hinder, lessen, restrain or suppress competition in the sale and distribution of chain and chain products among and between the several states; or that it maintained any artificial or monopolistic methods and prices in the sale of sash and kindred chain.

Exceptions of Respondent The Turner and Seymour Manufacturing Company, to the Trial Examiner's Recommended Decision.

1537

as such conclusion is totally unsupported by the evidence and is contrary to the greater weight of the evidence.

6. Respondent excepts to the Conclusion of Law contained in Paragraph Two that the capacity, tendency and effect of the use by this respondent of the freight equalization method to determine prices to be made to purchasers of sash and kindred chain is to hinder, lessen and restrain competition in price and to unfairly discriminate among purchasers in price; as such conclusion is contrary to the fact and law and is contrary to the evidence and to the greater weight of evidence.

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7. This respondent excepts to the Conclusion that its acts constitute an unfair method of competition in commerce and unfair and deceptive acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

8. This respondent excepts to the Conclusion that its acts constitute a violation of the provisions of sub-section (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

EXCEPTIONS TO AMENDMENT TO TRIAL EXAMINER'S RECOMMENDED DECISION

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1. This respondent excepts to the statement of the Trial Examiner on page 1 of the Amendment To Trial Examiner's Recommended Decision that it "knew or should have known the Institute and its members were engaged in an unlawful enterprise"; for the same reasons set forth in its exception to a similar statement appearing at page 25 of the Trial Examiner's Recommended Decision.

1540 *Exceptions of Respondent The Turner and Seymour Manufacturing Company, to the Trial Examiner's Recommended Decision.*

2. This respondent excepts to the finding that the systematic use of freight equalization by this respondent on sales of its sash and kindred chains, with the knowledge that its competitors used the same system, is a violation of law; and claims that the authorities cited by the Trial Examiner in support of such a rule do not sustain such a holding and are distinguishable on the facts.

EXCEPTIONS TO RULINGS ON REQUESTED FINDINGS

1541 This respondent excepts to the failure of the Trial Examiner to find the facts requested in each of the following Proposed Findings, each of which is supported by the evidence.

PARAGRAPHS 7-26 INCLUSIVE. These Proposed Findings, supported by R. 2261-2268, were apparently deemed irrelevant by the Trial Examiner. They show how this respondent came to adopt freight equalization, conclusively answer any claim of agreement to use freight equalization, demonstrate that freight equalization is used by this respondent only to meet competition, and should have been allowed by the Trial Examiner.

PARAGRAPHS 27-28. These facts were stipulated R. 2268-9.
1542 They show that it is not in the public interest to prohibit the use of "freight equalization" and show why this respondent uses freight equalization.

PARAGRAPH 29. This finding was requested that the Commission might see the entire picture and might see how small a factor this respondent is in the sash and kindred chain business. The fact was stipulated and undisputed (R. 2271).

Exceptions of Respondent The Turner and Seymour Manufacturing Company, to the Trial Examiner's Recommended Decision.

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PARAGRAPH 32. This finding was an important one. It was stipulated (R. 2271) and supported by the testimony of various witnesses (R. 1026, 1392) and all minutes of the regular meetings of the Institute which are in evidence.

PARAGRAPH 36. This proposed finding was stipulated (R. 2277) and undisputed and was important to this respondent in view of the finding by the Trial Examiner that this respondent "knew or should have known" of the activities of the Institute.

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PARAGRAPH 37. This was stipulated (R. 2278) and was presumably not found because the Trial Examiner believed it to be immaterial or irrelevant. Since membership in the Sash and Kindred Chain Group of the Weldless Chain Division of the Chain Institute was given by the Trial Examiner as one of the two reasons for finding against this respondent, this undisputed fact was material and should have been allowed.

PARAGRAPHS 42-45. These undisputed, stipulated facts (R. 2276-7, 2281), were material and relevant on the question of the existence of competition and should have been allowed.

1545

PARAGRAPH 46. This Proposed Finding was allowed in substance. The Proposed Finding was stipulated and should have been found, as requested (R. 2282).

PARAGRAPHS 50-52 INCLUSIVE. These Proposed Findings were stipulated (R. 2273-4) and show clearly that Turner and Seymour does not "exchange" price lists with the other respondents. They should have been allowed.

1546 *Exceptions of Respondent The Turner and Seymour Manufacturing Company, to the Trial Examiner's Recommended Decision.*

PARAGRAPH 53. This Proposed Finding was stipulated (R. 2272-3) and supported by Respondents Exhibits 1037A and 1037B.

PARAGRAPH 60. This Proposed Finding was stipulated (R. 2277) and while the Trial Examiner's report indicates that it was "allowed in substance," there is no such finding or statement with respect to this respondent in the Trial Examiner's Recommended Decision.

1547 PARAGRAPHS 60-63 INCLUSIVE. These Proposed Findings were stipulated (R. 2280) and are supported by the minutes of Meetings of the Sash and Kindred Chain Division (Comm. Ex. 260) in evidence and by Respondent's Exhibits 52). These Proposed Findings are material in view of the Trial Examiner's stated reasons for finding against this respondent.

PARAGRAPH 65. This Proposed Finding was stipulated (R. 2267, 2280) and should have been allowed.

PARAGRAPH 66. This Proposed Finding is supported by the record (R. 2283) and was material in view of the fact that the Trial Examiner based his finding against this respondent on attendance at meetings of the Sash and
1548 Kindred Chain Group.

PARAGRAPH 76. This Proposed Finding was stipulated (R. 2279) and should have been allowed.

PARAGRAPH 78. This Proposed Finding, which is vital, is stated to have been "allowed in substance". Presumably this is based upon the Trial Examiner's statement of his reasons for finding against this respondent. The Pro-

1549

posed Finding, which the Trial Examiner states was "allowed in substance" is that:

"The Turner and Seymour Manufacturing Company adopted and maintains 'freight equalization' in the sale of its products in order to meet competition and not as a result of any agreement, understanding or conspiracy."

This Proposed Finding is based upon all of the subordinate Proposed Findings and if "allowed in substance", should have been found as requested.

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PARAGRAPH 79. This Proposed Finding is based upon all of the evidence, including the fact, found by the Trial Examiner, that "On occasions Turner and Seymour published changed price lists increasing prices without waiting for American" (R. 2273).

REQUESTED CONCLUSIONS

COUNT I

(a) This respondent excepts to the failure of the Trial Examiner to find as requested in Proposed Conclusion (a).

COUNT II

1551

(a-i INCLUSIVE). This respondent excepts to the failure of the Trial Examiner to find as requested in Proposed Conclusions (a) through (i).

1552 *Exceptions of Respondent The Turner and Seymour Manufacturing Company, to the Trial Examiner's Recommended Decision.*

PROPOSED ORDER

This respondent excepts to the failure of the Trial Examiner to recommend to the Commission that it issue an order, in customary form, dismissing the amended complaint in its entirety as to this respondent, for the reason that the evidence fails to show any violation of law by this respondent.

THE TURNER AND SEYMOUR MANUFACTURING COMPANY
/s/ MARSH, DAY & CALHOUN,
1553 Its Attorneys.

Filed October 25, 1948.

Exceptions of Respondent, The John M. Russell Manufacturing Company, to the Trial Examiner's Recommended Decision and Rulings on Requested Findings.

Respondent, The John M. Russell Manufacturing Company joins in the exceptions filed on behalf of itself and on behalf of the other respondents by Sumner S. Kittelle and the firm of Kittelle and Lamb. In addition thereto, this
1554 respondent excepts to the following portions of the Trial Examiner's Recommended Decision, as amended, and to the Examiner's failure to include the following proposed findings and conclusions requested under Rule XXI.

1. Respondent excepts to the statement appearing at page 25 to the effect that Paragraphs Nine, Ten and Eleven of Count I of the Amended Complaint should not be dis-

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missed as to respondent, The John M. Russell Manufacturing Company, "for the reason that sash and kindred chain are weldless chain; that they were both members of the Sash and Kindred Chain Group of the Institute which was part of the Institute, and knew or should have known the Institute and its members were engaged in an unlawful enterprise and continued their membership without protest".

Each of the premises or subordinate facts upon which the conclusion that Paragraphs 8, 9 and 10 of Count I should not be dismissed as to this respondent is based is either entirely unsupported by the evidence or is given a significance and meaning which it cannot have when contrasted with other facts found and with the evidence, and, therefore, the conclusions based thereon cannot stand.

1556

(a) *The statement that "sash and kindred chain are weldless chain".*

Sash and kindred chain are weldless chain only in the sense that they are not "welded". The Trial Examiner's Findings recognize that "sash and kindred chain" is an entirely distinct class of chain from "weldless chain". For example, at page 36 the Trial Examiner states that the method of making sash and kindred chain differs from that used in making "ordinary weldless chain" (citing R. 610) and that "for a number of years sash and kindred chain was manufactured by companies which did not make any other types of chain and *the history and selling practices indicate that this is a separate branch of the chain industry*" (citing R. 1258, 2244-5, 2261, 2263). At pages 36 and 37 the Trial Examiner refers to "welded chain, weldless chain, sash and kindred chain and tire chain" and at page 40 he refers to "welded, weldless or sash and

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1558 *Exceptions of Respondent The John M. Russell Manufacturing Company to the Trial Examiner's Recommended Decision and Rulings on Requested Findings.*

kindred chain", recognizing clearly that "sash and kindred chain" and "weldless chain" were two separate and distinct classes of chain. Again, at pages 39 and 48 the Trial Examiner states that this respondent made and sold "only sash and kindred chain".

On the Trial Examiner's own findings of fact it is clear that "weldless chain" and "sash and kindred chain" are two distinct classes of chain and that the statement that "sash and kindred chain are weldless chain", while true in the same sense that a pigeon is a bird, in view of the
1559 other findings of fact, has no significance whatever as the basis for a finding that Paragraphs 8, 9 and 10 of Count I should not be dismissed "for the reason that sash and kindred chain are weldless chain".

(b) *The statement that "they were both members of the Sash and Kindred Chain Group of the Institute which was a part of the Institute, and knew or should have known the Institute and its members were engaged in an unlawful enterprise and continued their membership without protest".*

There is absolutely no basis in the evidence to support any finding that this respondent "knew or should have known the Institute and its members were engaged in an
1560 unlawful conspiracy".

The Trial Examiner has found, at page 27, that:

(1) The Sash and Kindred Chain Group is recognized as a separate and distinct division;

(2) The Sash and Kindred Chain Group holds its meetings infrequently;

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(3) No meetings of this Group have been held for several years;

(4) Companies which are members of this Group only do not receive notice of meetings of the Institute;

(5) Meetings of the Sash and Kindred Chain Group are held separate and apart from the weldless chain group, the welded chain group, and the tire chain group;

(6) Members of the Sash and Kindred Chain Group only do not receive copies of the minutes of meetings of the Institute. 1562

The John M. Russell Manufacturing Company was a member of the Sash and Kindred Chain Group only (Finding 15 under Count I; R. 2250).

The foregoing specific and detailed findings are obviously irreconcilable with any ultimate finding that The John M. Russell Manufacturing Company "knew or should have known" the Institute and its members were engaged in an unlawful enterprise and continued their membership without protest.

2. Respondent excepts to the finding contained in Count I, Paragraph One, (15) to the effect that John M. Russell manufactures and sells "the type of weldless chain known as sash and kindred chain", for the reason that sash and kindred chain is a separate type of chain, as indicated by the finding of the Trial Examiner in Paragraph Two that "the principal types of chain involved are welded chain, weldless chain, sash and kindred chain, and tire chain", (Citing R. 609-610); and the finding at page 36 that "the history and selling practices indicate that this is a separate branch of the chain industry" (Citing R. 1258, 2244-5, 2261, 1563

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2263); and the finding at page 37 that "sash and kindred chain" is a separate kind of chain from "weldless chain". See also note 65 on page 40 of the Recommended Decision and Findings.

3. Respondent excepts to the statement, as far as it is concerned, appearing at the end of Note 79 (Page 44) to the effect that a prior agreement as to maintenance of and changes in price was shown by "the systematic, *pro forma* and prompt adoption of each changed price list as and when issued by American by each of the respondent manufacturers" and by "the prompt transmission by each respondent of its revised price list, to all other respondent manufacturers", because there is no evidence whatever either that this respondent followed American Chain Company on prices (i.e. net prices) or that it sent its price lists, covering a few kinds of sash and kindred chain only, to all of the other respondent manufacturers. The evidence is directly to the contrary.

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The Trial Examiner found (page 31, Paragraph 15) that this respondent manufactures and sells "only a few types of the kind of weldless chain known as sash and kindred chain". The evidence shows that this respondent issued only *four* discount sheets during the period covered by these proceedings while American published more than a dozen discount sheets (Comm. Ex. 473-517). It was stipulated that while this respondent's prices, in general, followed those of American "its increases have always lagged behind those of American and its prices have at times been lower" (R. 2248). The Trial Examiner has found in substance the Proposed Finding #38 to the effect that this respondent "does not exchange price lists with its competitors, although it does send notices of its price

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Exceptions of Respondent The John M. Russell Manufacturing Company to the Trial Examiner's Recommended Decision and Rulings on Requested Findings. 1567

changes to those competitors to whom it sells chain items. Such notices are sent only at the same time that announcement is made to the trade generally" (R. 2249).

These findings are directly contrary to the statement of the Trial Examiner at page 44, note 79.

4. This respondent excepts to the finding contained in Count 2, Paragraph Six, that "it is stipulated that the published list prices, published discounts therefrom and published list extras thereon for * * * weldless * * * chain of any one of the respondent manufacturers were as published at the time by all other respondents selling such products" and also to the finding that "this resulted from the agreed price leadership plan adopted and followed by all respondents", because: 1568

(1) The John M. Russell Manufacturing Company did not stipulate that its published discounts were the same as those of the other respondent manufacturers (Comm. Ex. 1579, R. 892, 896) and the discounts of John M. Russell and those of American were not in fact the same, as indicated by the discrepancy in the number of discount sheets issued by each.

5. This respondent excepts to the Conclusion of Law contained in Paragraph One that it took part in any combination, conspiracy or planned course of action having the capacity, tendency or effect to hinder, lessen, restrain or suppress competition in the sale and distribution of chain and chain products among and between the several states, or that it maintained any artificial or monopolistic methods and prices in the sale of sash and kindred chain, as such conclusion is totally unsupported by the evidence and is contrary to the greater weight of the evidence. 1569

1570 *Exceptions of Respondent The John M. Russell Manufacturing Company to the Trial Examiner's Recommended Decision and Rulings on Requested Findings.*

6. Respondent excepts to the Conclusion of Law contained in Paragraph Two that the capacity, tendency and effect of the use by this respondent of the freight equalization method to determine prices to be made to purchasers of sash and kindred chain is to hinder, lessen and restrain competition in price and to unfairly discriminate among purchasers in price; as such conclusion is contrary to the facts and law and is contrary to the evidence and to the greater weight of evidence.

1571 7. This respondent excepts to the Conclusion that its acts constitute an unfair method of competition in commerce and unfair and deceptive acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

8. This respondent excepts to the Conclusion that its acts constitute a violation of the provisions of sub-section (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

EXCEPTIONS TO AMENDMENT TO TRIAL EXAMINER'S RECOMMENDED DECISION

1572 1. This respondent excepts to the statement of the Trial Examiner on page 1 of the Amendment To Trial Examiner's Recommended Decision that it "knew or should have known the Institute and its members were engaged in an unlawful enterprise"; for the same reasons set forth in its exception to a similar statement appearing at page 25 of the Trial Examiner's Recommended Decision.

Exceptions of Respondent The John M. Russell Manufacturing Company to the Trial Examiner's Recommended Decision and Rulings on Requested Findings. 1573

2. This respondent excepts to the finding that the systematic use of freight equalization by this respondent on sales of its sash and kindred chains, with the knowledge that its competitors used the same system, is a violation of law, and claims that the authorities cited by the Trial Examiner in support of such a rule do not sustain such a holding and are distinguishable on the facts.

EXCEPTIONS TO RULINGS ON REQUESTED FINDINGS

This respondent excepts to the failure of the Trial Examiner to find the facts requested in each of the following Proposed Findings, each of which is supported by the evidence: 1574

PARAGRAPHS 1, 2, 5, 6, 7, 8. These Proposed Findings were stipulated (R. 2244-5, Resp. Ex. 51A) and should have been allowed in order to give the Commission the true picture of this respondent.

PARAGRAPHS 9-15 INCLUSIVE. Apparently the Trial Examiner felt that these Proposed Findings, which trace and explain the experience of John M. Russell Manufacturing Company which led it to adopt freight equalization, were immaterial. The facts were stipulated (R. 2246-7) and were material to shew that John M. Russell adopted freight equalization independently and for valid business reasons. 1575

PARAGRAPH 16. The Trial Examiner states that he has allowed this Proposed Finding "in substance". It is supported by the Record (R. 2247) and should have been found, as requested.

1576 *Exceptions of Respondent The John M. Russell Manufacturing Company to the Trial Examiner's Recommended Decision and Rulings on Requested Findings.*

PARAGRAPHS 18-21 INCLUSIVE. These Proposed Findings were stipulated (R. 2247-8) and should have been allowed in order that the Commission might properly pass on the use of "freight equalization" by this respondent. These Proposed Findings show clearly that freight equalization was used only where requested by a customer and was needed to meet competition.

PARAGRAPH 25. The Trial Examiner states that this Proposed Finding is "allowed in substance". It is supported
1577 by the Record (R. 2248-9) and should have been allowed, as requested.

PARAGRAPHS 27-28. These two Proposed Findings were stipulated (R. 2249), are of great importance and should have been allowed, as requested.

PARAGRAPH 29. This was stipulated (R. 2249) and should have been found.

PARAGRAPH 30. This Proposed Finding was stipulated (R. 2249) and should have been allowed.

PARAGRAPH 34. This Proposed Finding was allowed "in substance". It should have been allowed as requested
1578 (R. 2250).

PARAGRAPH 35. This Proposed Finding was stipulated (R. 2250-2251) and in view of the fact that the Trial Examiner relied on the membership of this respondent in the Sash and Kindred Chain Group of the Chain Institute as a ground for finding against the respondent this Proposed Finding should have been allowed.

Exceptions of Respondent The John M. Russell Manufacturing Company to the Trial Examiner's Recommended Decision and Rulings on Requested Findings. 1579

PARAGRAPH 36. This Proposed Finding was material in view of the Trial Examiner's stated reason for holding against this respondent, was stipulated (R. 2250) and should have been allowed.

PARAGRAPH 37. This Proposed Finding was material in view of the Trial Examiner's stated reason for holding against this respondent, was stipulated and supported by the evidence (R. 2251, Resp. Ex. 51C), and should have been allowed.

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PARAGRAPHS 41 AND 42. These Proposed Findings were supported by stipulation (R. 2251, 2252) and should have been allowed, particularly in view of the Trial Examiner's stated reason for holding this respondent.

PARAGRAPH 44. This Proposed Finding was supported by the Record and by stipulation (R. 2252, Comm. Ex. 260) and, in view of the Trial Examiner's stated reason for holding this respondent was material and should have been allowed.

PARAGRAPH 47. The Trial Examiner apparently believed this Proposed Finding to be immaterial (See Note 108). However, the matter was alleged and should have been allowed in favor of this respondent (R. 2254). 1581

PARAGRAPH 48. This Requested Finding was supported by stipulation (R. 2254-2255) and, in view of the Trial Examiner's stated reason for holding against this respondent, was material and should have been allowed.

PARAGRAPH 49. This Requested Finding was supported by stipulation (R. 2255), was material and should have been allowed.

1582 *Exceptions of Respondent The John M. Russell Manufacturing Company to the Trial Examiner's Recommended Decision and Rulings on Requested Findings.*

REQUESTED CONCLUSIONS

Count I

(a) This respondent excepts to the failure of the Trial Examiner to find as requested in Proposed Conclusion (a).

Count II

(a-i INCLUSIVE). This respondent excepts to the failure
1583 of the Trial Examiner to find as requested in Proposed Conclusions (a) through (i).

PROPOSED ORDER

This respondent excepts to the failure of the Trial Examiner to recommend to the Commission that it issue an order, in customary form, dismissing the amended complaint in its entirety as to this respondent, for the reason that the evidence fails to show any violation of law by this respondent.

THE JOHN M. RUSSELL MANUFACTURING COMPANY,
/s/ MARSH, DAY & CALHOUN,
1584 Its Attorneys.

Filed October 25, 1948.

1585

Exceptions of Respondent Columbus McKinnon Chain Corporation to Trial Examiner's Recommended Decision.

Now comes respondent Columbus McKinnon Chain Corporation, (hereinafter called Columbus McKinnon), by its attorneys, and excepts to the Trial Examiner's Recommended Decision, heretofore filed with the Commission, in the following particulars, to wit:

Count I

1. Exception is taken to the denial of its separate motion to dismiss the amended complaint appearing in the second paragraph on page 25, wherein it is stated in substance that the motion should be denied because Columbus McKinnon was a member of the Institute and knew or should have known the Institute and its membership were engaged in an unlawful enterprise and continued its membership therein without protest. 1586

Even assuming that there is evidence to support the statement that the Institute and its membership were engaged in an unlawful enterprise, which we do not admit and vigorously deny, there is absolutely no evidence to support the statement that Columbus McKinnon knew or should have known of such illegal enterprise. The Phelps Dodge Refining Corporation case, 139 F. (2d.) 393, cited by the Examiner in support of his findings clearly states that mere membership in an association alone, without guilty knowledge, is not enough (page 396). 1587

Furthermore, mere knowledge or approval of or acquiescence in the object and purpose of a conspiracy without agreement to cooperate to accomplish such object or purpose is not enough to constitute one a party to a conspiracy. Thomas v. United States, 57 F. (2d.) 1039; Patterson v. United States, 222 F. 599, 631. Active participa-

1588 *Exceptions of Respondent Columbus McKinnon Chain Corporation to Trial Examiner's Recommended Decision.*

tion must be established. In Turcott v. United States, 21 F. (2d.) 829, it was said (page 829):

> "The law is well settled that active participation must be established; mere knowledge of the illegal acts of others is not sufficient."

2. Exception is taken to the denial of its motion to strike from the record all exhibits and testimony other than the exhibits prepared or written by it appearing in the first paragraph at the top of page 26 for the reason that there
1589 is no proof whatsoever that Columbus McKinnon was a party to any conspiracy if in fact one existed. It is well settled that no act or declaration of one respondent is binding upon any other respondent unless and until the existence of a conspiracy and the connection of the individual co-conspirator therewith has been proved by independent evidence. 4 Wigmore 127; Winchester & Partridge Mfg. Co. v. Creary et al., 116 U. S. 161; Glasser v. United States, 315 U. S. 60; Stager v. United States, 233 F. 510, 513. This is a substantive rule and not an evidentiary one and is based on the fact that once a conspiracy is established on agency principles each conspirator is liable for the acts of every other co-conspirator. However proof of the existence of and membership in the con-
1590 spiracy by independent proof is an imperative condition precedent to the acts and declarations of one respondent being binding upon others: 4 Wigmore 127. There is no independent evidence whatsoever to connect Columbus McKinnon with any alleged conspiracy and the Trial Examiner should accordingly have recommended that its motion to strike be granted.

3. Exception is taken to sub-paragraph one of paragraph four and in particular to the statement at the bottom of

1591

page 39 that "Prices and discounts established by respondent American were the result of understandings with other respondent manufacturers as hereinafter set forth." There is no proof whatsoever that Columbus McKinnon had any understanding with American as to prices and discounts. The fact that similarity of published prices existed is no basis upon which to make a finding that there was an understanding. It is clear from the decided cases that the existence of price similarity, where a standard product is being sold, as here, is recognized as an expression not of conspiracy but of active competition. The uniformity which 1592
at any given time existed between the published prices of American and Columbus McKinnon is no evidence of any understanding. We quote from a government publication:

> "The absence of any form of buyer preference means that no individual seller can, for any appreciable period, charge a higher price for his product than is being quoted by his rivals. There may be exceptional cases in which a concern controls so large a share of the total supply of the product that buyers cannot satisfy their requirements without patronizing it; under such circumstances it is conceivable that price differentials can be maintained. In general, however, it is clear that individual sellers of standardized products cannot effectively maintain independent price policies." 1593
>
> TNEC, Monograph No. 1, Price Behavior and Business Policy, U. S. Govt. Printing Office, Washington, 1940, page 6.

In United States v. Standard Oil Co. of N. J., 47 F. (2d.) 288, the Court said (page 317):

> "Grocers, butchers, and all other lines in the same markets generally sell the same things at the same

prices, for the sound reasons that they wish to get all they can, that they cannot get more than the price at which the bulk of what is sold in their respective markets is selling, and that they do not think it wise to cut prices."

The Court further said:

"The entire evidence seems to establish that, in the main, the wholesale and the retail prices of the major companies take the same changes at close to the same
1595 time. * * * While it is not the subject of direct evidence it is fairly inferable from the situation shown by the evidence that, if the major companies follow the Socony prices in this area, they do so because they do not wish to engage in a price-cutting war which might entail losses to all concerned (including Socony) without any compensating benefits. Such a view has no sinister aspect, but is merely a matter of business judgment and prudence illustrated in every community in the country by retail competition in all lines."

In U. S. v. International Harvester Co., 274 U. S. 693 the Supreme Court said:

"* * * and the fact that competitors may see proper
1596 in the exercise of their own judgment, to follow the price of another manufacturer, does not establish any suppression of competition or any sinister domination."

No Manufacturer is required to ruin his business in a vain endeavor to avoid charging the same prices as his competitors, and the fact that price similarity existed between American and Columbus McKinnon is perfectly

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natural, raising no inference of collusion such as would be drawn by the Trial Examiner.

4. Exception is taken to sub-paragraph 2 A of paragraph four and in particular to the finding on page 42 that current prices were discussed while the members were at Institute meetings, and that before and after the formal meetings were convened and adjourned, present and future prices were discussed and understandings arrived at with reference to continuance of, or changes in, current prices, which understandings were reflected in price lists thereafter issued by American.

1598

There is not one scintilla of evidence that any representatives of Columbus McKinnon ever discussed prices at an Institute meeting or at any other time.

5. Exception is taken to sub-paragraph 2B of paragraph four for the reason that the conclusions stated therein are not supported by the record and are in all respects unwarranted and erroneous.

6. Exception is taken to the statement in footnote 92 on page 48 that Columbus McKinnon admits that the facts set forth in paragraphs Nine, Ten and Eleven of the main stipulation are true, and to the statement that the rejection by it of paragraph Eight of the main stipulation was immaterial and that despite such specific rejection it knew that all other respondents selling like chains were using the same system.

1599

1600 *Exceptions of Respondent Columbus McKinnon Chain Corporation to Trial Examiner's Recommended Decision.*

Columbus McKinnon did not admit that the facts set forth in paragraphs Nine, Ten and Eleven of the main stipulation were true. It stipulated that if duly appointed representatives of those of the respondents who did sign the stipulation were called as witnesses they would testify to the same effect as the language that appears in said paragraphs Nine, Ten and Eleven. This is not an admission binding on Columbus McKinnon that such facts are true.

Columbus McKinnon specifically rejected that part of
1601 the stipulation appearing in paragraph Eight and there is no evidence in the record that it used any of the pricing methods with knowledge that other respondents did likewise. In fact the only evidence is to the exact contrary (its rejection of that part of the stipulation that so stated).

7. Exception is taken to sub-paragraph 4B of paragraph Four relating to the Donley Freight Rate Book. Request to find No. 19 submitted by Columbus McKinnon was allowed by the Trial Examiner. This request is as follows:

> "19. Columbus McKinnon did not use the Donley Freight Rate Book in its sales of welded chain or weldless chain."

1602

8. Exception is taken to sub-paragraph seven of paragraph four starting on page 52.

Columbus McKinnon did not sign the stipulation referred to therein. Furthermore it has been stipulated on the record that the price of its patented tire chains was always different from the price of other respondents' tire chains (Commission Ex. 1635).

Exceptions of Respondent Columbus McKinnon Chain Corporation to Trial Examiner's Recommended Decision. 1603

9. Exception is taken to paragraph Five on page 54 for the reason that the conclusion set forth therein is wholly unsupported by the evidence and is unwarranted and erroneous.

10. Exception is taken to the disregarding and rejection of evidence by the Trial Examiner in footnotes 10 , 107 and 108 on pages 54 and 55.

COUNT II

Columbus McKinnon repeats with the same force and 1604
effect as though set out in full herein the exceptions to such parts of Count I as are adopted by the Trial Examiner under Count II.

11. Exception is taken to paragraph Six for the reason that Columbus McKinnon did not sign the stipulation referred to therein and its prices for patented tire chains which comprised 90-95% of its tire chain sales were at all times different (Commission Ex. 1635).

CONCLUSIONS OF LAW

12. Exception is taken to paragraphs One and Two of the Trial Examiner's Conclusions of Law.

1605

CONCLUSIONS ON COUNTS I AND II

13. Exception is taken to the conclusions on Counts I and II appearing on page 58.

14. Exception is taken to the Rejection by the Trial Examiner of the following Findings requested by Columbus McKinnon:

1606 *Exceptions of Respondent Columbus McKinnon Chain Corporation to Trial Examiner's Recommended Decision.*

Paragraphs 5, 7, 9-13, both inclusive, 16-18, both inclusive, and 20-29, both inclusive.

15. Exception is taken to the conclusion of the Trial Examiner on page 59 that Columbus McKinnon did not join in the findings requested by all respondents. Although Columbus McKinnon submitted separate proposed findings of facts and conclusions it also joined in the proposed findings of facts, conclusions and order submitted on behalf of all the respondents and contained in the appendix to
1607 respondents' memorandum to the Trial Examiner.

16. Exception is taken to the proposed order recommended by the Trial Examiner except the Third paragraph on page 64 and the last two paragraphs of the said order appearing on page 65.

The foregoing exceptions are separate and supplemental to the general exceptions filed on behalf of all the respondents, including Columbus McKinnon, and Columbus McKinnon hereby joins in all other separate and supplemental exceptions filed herein to the extent pertinent to it.

October 22, 1948.

1608 Respectfully submitted,

FINCK & HUBER,
Attorneys for Respondent Columbus McKinnon Chain Corporation,
804 Liberty Bank Building,
Buffalo, New York.

Filed October 25, 1948.

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United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 14821
CIVIL

CHAIN INSTITUTE, INC.; AMERICAN CHAIN & CABLE COMPANY, INC.; THE BRIDGEPORT CHAIN & MANUFACTURING COMPANY; THE McKAY COMPANY; HODELL CHAIN COMPANY; ST. PIERRE CHAIN CORPORATION; S. G. TAYLOR CHAIN COMPANY; CLEVELAND CHAIN & MANUFACTURING COMPANY; COLUMBUS McKINNON CHAIN CORPORATION; CAMPBELL CHAIN COMPANY; NIXDORFF-KREIN MANUFACTURING COMPANY; PEERLESS CHAIN COMPANY; ROUND CALIFORNIA CHAIN COMPANY; THE JOHN M. RUSSELL MANUFACTURING COMPANY, INC.; SEATTLE CHAIN & MFG. COMPANY; TURNER & SEYMOUR MANUFACTURING COMPANY; WESTERN CHAIN PRODUCTS COMPANY; WOODHOUSE CHAIN WORKS; DENNIS A. MERRIMAN; WILLIAM D. KIRKPATRICK; and GEORGE J. CAMPBELL, JR.,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

JOINT AND SEVERAL PETITION AND SUPPLEMENTAL PETITION TO REVIEW ORDER OF FEDERAL TRADE COMMISSION

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FILED

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Exceptions to the Trial Examiner's Report by Counsel Supporting the Complaint.

1. Exception is taken to the finding and the reasons given therefor under conclusions of law, at pages 22-24, that the motions of respondents American Chain & Cable Company, et al., to strike and dismiss as to each of them paragraphs 6 and 7 and related matter in subparagraphs 15, 16 and 17 of paragraph 5 of count I of said amended complaint should be granted. The amended complaint alleges a conspiracy to fix prices by all the respondents and by respondent American Chain & Cable Company and its licensees, all of said respondents being members of respondent Chain Institute, Inc.

1610

2. Exception is taken to the finding and reasons given therefor at pages 24 and 25 that the motions of respondents Cleveland Chain & Manufacturing Company, et al., to strike and dismiss as to them paragraphs 6 and 7 and related matter appearing in subparagraphs 15, 16 and 17 of paragraph 5 of count I of said amended complaint, should be granted. The reason for this exception is the same as that given to exception 1 above.

3. Exception is taken to the finding appearing at page 25 and the reasons given therefor, that the motions of respondents Shirley, Olcott and Nichols to dismiss the amended complaint as to each of them, should be granted. The amended complaint alleges a conspiracy to fix prices by all the respondents and by respondent American Chain & Cable Company and its licensees, all of said respondents being members of respondent Chain Institute, et al., and Messrs. Shirley, Olcott and Nichols having been employed by said respondent American and its said licensees.

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4. Exception is taken to the statement appearing at page 38 that respondent American Chain & Cable Company for-

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wards its price lists and discount sheets to each of the respondent manufacturers who were and are its customers, for the reason that said price lists and discount sheets are sent to all their respondent competitors (R. 1215, 1246-8, 1535, 1750, 1752, 1973-4, 2015-16).

5. Exception is taken to the trial examiner's failure to give evidentiary value to the letters of the late George J. Campbell, Sr., and to the trial examiner's reasons therefor. No objection was made to the admission of said letters in evidence during the hearings in this proceeding, and said

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letters are considered competent, material and relevant.

6. Exception is taken to the allowance by the trial examiner on page 60 of his report, of paragraph 19 of the findings requested by Columbus McKinnon Chain Corporation that it did not use the Donley Freight Rate Book in its sale of welded chain. The evidence shows it received from Charles Donley the regular freight rate service given to other respondents (Comm. Ex. 886-A).

Respectfully submitted,

EVERETTE MACINTYRE,
Chief, Division of Anti-Monopoly Trials.
K. E. STEINHAURER,
Attorney.

1614

Filed October 4, 1948.

1615

Letter to Federal Trade Commission.

August 23, 1949.

Federal Trade Commission,
Washington, D. C.

Attention D. C. Daniel, Esq.,
Secretary.

Dear Sir:

This is to advise you that International Chain and Manufacturing Company, one of the respondents in the above entitled action, has by formal proceeding changed its name. 1616

Its present name is Campbell Chain Company. The effective date of this change was April 26, 1949.

Yours truly,

FREDERICK B. GERBER.

Filed August 24, 1949.

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Order Granting in Part and Denying in Part Various Motions of the Respondents.

This matter came on to be heard by the Commission upon the following-described motions of the respondents: (The respondents are sometimes hereinafter referred to by abbreviated names. For example, respondent American Chain & Cable Company is sometimes hereinafter referred to as respondent "American," et cetera.)

Date Filed	*Filed by Respondent*	*Subject Matter*
Oct. 30, 1945	Russell	To dismiss amended complaint.
Nov. 30, 1945	Nixdorff-Krein Peerless Western Woodhouse Merriman	To sever and dismiss Paragraph Six and Seven of Count I of amended complaint.
Mar. 13, 1946	Turner & Seymour	To sever and dismiss Paragraphs Five (8), Five (16), Five (17), Six, Seven, Nine, and Eleven of Count I of amended complaint
Apr. 12, 1946	Cleveland Bridgeport Round California Seattle	To sever and dismiss Paragraphs Six and Seven of Count I of amended complaint
Sept. 30, 1947	Turner & Seymour	To sever and dismiss Paragraphs Five (8), Five (15), Five (16), Five (17), Six, Seven, Nine, and Eleven of Count I, and to dismiss amended complaint
Sept. 30, 1947	Russell	Same as motion of Turner & Seymour above

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Order Granting in Part and Denying in Part Various Motions of the Respondents. 1621

Date Filed	*Filed by Respondent*	*Subject Matter*	
Sept. 30, 1947	Columbus McKinnon	To dismiss amended complaint; to sever and dismiss as to it the charges relating to American's tire chain patent licenses and the charges relating to the Shirley, Olcott & Nichols' arrangement; and to strike certain exhibits and testimony	
Oct. 16, 1947	Cleveland Bridgeport Round California Seattle International Nixdorff-Krein Peerless Western Woodhouse Merriman Campbell Institute	To sever and dismiss part of Paragraphs Three, Five (1) and, Five (16), and all of Paragraphs Five (17), Six and Seven, of Count I, and part of Paragraph Three of Count II, of amended complaint	1622
Oct. 16, 1947	All respondents except Columbus McKinnon, Russell, Turner & Seymour, and McCann	To dismiss amended complaint for lack of proof	
Nov. 6, 1947	Shirley Olcott Nichols	To sever and dismiss all charges relating to them	1623
Nov. 6, 1947	American McKay Hodell Pyrene St. Pierre Taylor Kirkpatrick Bond	To sever and dismiss all charges relating to Shirley, Olcott, and Nichols	

1624 *Order Granting in Part and Denying in Part Various Motions of the Respondents.*

Date Filed	*Filed by Respondent*	*Subject Matter*
Feb. 9, 1948	American McKay Hodell Pyrene St. Pierre Taylor Kirkpatrick Bond	To sever and dismiss all charges relating to American's reinforced tire chain patent licenses
Feb. 9, 1948	Columbus McKinnon	To renew motions previously filed
Feb. 20, 1948	All respondents except Columbus McKinnon and McCann	To renew motions previously filed
May 7, 1948	Pyrene	To dismiss amended complaint
Dec. 21 1951	Shirley Olcott Nichols	To dismiss amended complaint

1625

The amended complaint herein in Count I charges all of the respondents with having combined and conspired to restrain trade and commerce in the sale of chain and chain products. Among the acts and things alleged to have been done and performed pursuant to, in furtherance of, and as a part of the combination are that respondent American entered into certain unlawful price fixing agreements with
1626 respondents McKay, Hodell, St. Pierre, Pyrene, and Taylor, involving certain patents on improvements on tire chains owned by respondent American, and that respondents American, McKay, Pyrene, and Hodell entered into arrangements with Shirley, Olcott & Nichols (hereinafter sometimes referred to as "Shirley") whereby the latter, acting as the common agent for all the respondent members, submitted bids on tire chains to agencies of the Federal Government at prices which were determined by respondent American after its collaboration and agreement with other re-

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spondent members. Each of the respondents, except respondent McCann, has moved, in one or more of the above-described motions, for severance and dismissal of the charges in the amended complaint relating to the tire chain patent licenses and the arrangement between certain of the respondent manufacturers and Shirley, Olcott & Nichols. The hearing examiner, to whom such motions were referred for report and recommendation, has recommended the granting of same.

For the reasons stated in its findings as to the facts, the Commission does not agree with the hearing examiner's conclusions that the unlawful acts and practices of the 1628
respondents American, McKay, Pyrene, Hodell, St. Pierre, and Taylor, with the aid and assistance of Shirley, were unrelated to the acts and practices of all the respondents in connection with the over-all conspiracy in which all the respondents were engaged.

By including provisions relating to the maintenance of minimum prices and discounts in agreements purporting to grant licenses to use certain patents, and by conspiring and agreeing as to the prices at which tire chain embodying the patented device would be offered for sale and sold, all as set forth in the Commission's findings as to the facts in this matter, the respondents American, McKay, Pyrene, Hodell, St. Pierre, and Taylor did all that it was necessary for them to do to completely eliminate all competition in 1629
the price of such chain. None of the other respondents manufactured or sold this particular type of chain. The general purpose and result of the combination and conspiracy engaged in by all the respondents was to fix and maintain prices on chain and chain products. The arrangements by which American and its licensees fixed and maintained the prices on tire chain embodying the patented feature represent only one of the means by which the over-

all combination and conspiracy was effectuated. The arrangements with Shirley were made possible because of the combination and conspiracy between respondent American and its licensees with respect to bar reinforced tire chain, and because of the understandings and agreements between all of the respondents selling standard unpatented tire chain as to the prices at which standard unpatented tire chain would be offered for sale and sold to the Government, as well as to other purchasers.

Under these circumstances, the Commission is of the opinion that the various motions requesting dismissal of the
1631 charges in the amended complaint relating to the license agreements between respondent American and its licensees and to the arrangements with Shirley, Olcott & Nichols, should be denied. Insofar as the respondents Shirley, Olcott, and Nichols are concerned, it appears that respondent Shirley died on September 14, 1951, and that the partnership of Shirley, Olcott & Nichols was terminated on September 15, 1951. The arrangements with Shirley, Olcott & Nichols were terminated prior to the issuance of the original complaint and it does not appear that there is likelihood of such arrangements being resumed. Under these circumstances, the Commission is of the opinion that the public interest does not require that Shirley, Olcott, and Nichols be retained as respondents in this proceeding.

1632 Insofar as the various motions request dismissal of the amended complaint because of a lack of proof to sustain the charges, they should be denied, for the reason that the evidence establishes that the respondent Institute and its members did combine and conspire to restrain trade in commerce in the sale of chain and chain products. Each of the respondents is shown to have participated in one or more of the unlawful acts and practices by which the combination and conspiracy was effectuated.

Order Granting in Part and Denying in Part Various Motions of the Respondents. 1633

The fact that some of the respondents did not manufacture or sell all of the products involved in this proceeding and therefore did not engage in, use, and employ all the acts, practices, and methods by which the over-all conspiracy was effectuated does not constitute sufficient grounds for dismissal as to them of all the charges in the amended complaint or of those charges relating to the practices or methods which they did not engage in or use. The law is well settled that the act or acts of any one or more conspirators done in furtherance of a conspiracy are attributed as a matter of law to all of the conspirators.

The motion of respondent Columbus McKinnon Chain 1634
Corporation to strike from the record all exhibits and testimony other than the exhibits prepared by it and all exhibits consisting of correspondence written by George J. Campbell, Sr., should be denied. The evidence establishes that there was a combination and conspiracy in restraint of trade and that this respondent was a party to same. The testimony and exhibits which this respondent moves be stricken from the record are competent, relevant, and material to the issues in this proceeding and were properly received in evidence by the hearing examiner.

The motion of respondent Pyrene Manufacturing Company to dismiss the amended complaint as to it for the reason that it has discontinued the manufacture and sale of tire chains, the only type of chain involved in this pro- 1635
ceeding which said respondent manufactured or sold, should also be denied. The record shows that this respondent did discontinue the manufacture and sale of tire chains shortly after the taking of testimony was completed. The activities of this respondent, however, in the combination and conspiracy established by the record were such that the public interest requires that it be retained as a respondent in this proceeding.

1636 *Order Granting in Part and Denying in Part Various Motions of the Respondents.*

The Commission having duly considered the aforesaid motions, the hearing examiner's report and recommendations thereon, and the record herein, and being now fully advised in the premises:

It is ordered that the aforesaid motions be, and they hereby are, granted insofar as they request dismissal of the amended complaint as to respondents Shirley, Olcott, and Nichols, and otherwise denied.

By the Commission, Commissioner Carretta not participating for the reason that oral argument on the merits
1637 was heard prior to his appointment to the Commission.

Seal

D. C. Daniel,
Secretary.

Issued: February 16, 1953.

Filed February 16, 1953.

Order Disposing of Exceptions to Hearing Examiner's Recommended Decision.

This matter came on to be heard by the Commission upon exceptions to the hearing examiner's recommended
1638 decision filed by counsel supporting the complaint and by all the respondents except Walter S. McCann, deceased, and Pyrene Manufacturing Company. (The respondents are sometimes hereinafter referred to by abbreviated names. For example, respondent American Chain & Cable Company, Inc., is sometimes hereinafter referred to as respondent "American," et cetera.)

EXCEPTIONS FILED BY COUNSEL SUPPORTING THE COMPLAINT

1, 2 and 3. These exceptions are to the hearing examiner's recommendation that certain motions of the respondents be granted. The motions which the hearing examiner recommended granting pertain to Paragraphs Six and Seven and related matters in subparagraphs (15), (16), and (17) of Paragraph Five of Count I of the amended complaint. The respondents contended in their various motions that the issues raised by the allegations in the above-mentioned portions of the amended complaint should 1640
be severed from the other allegations therein. The hearing examiner found, in effect, that although certain of the respondents have engaged in the unlawful acts and practices alleged in these portions of the amended complaint, such acts and practices formed no link in or part of, but were plainly antagonistic to, the over-all conspiracy alleged in other portions of the amended complaint. As additional reasons for his recommendation, the hearing examiner cited the fact that the unrelated acts and practices were discontinued prior to the commencement of this proceeding and also that an order with respect to the over-all conspiracy will effectively prevent any repetition of said unlawful acts and practices.

The evidence in the record clearly establishes that certain 1641
of the respondents did engage in the acts and practices substantially as alleged in Paragraphs Six and Seven and in portions of subparagraphs (15), (16), and (17) of Paragraph Five of Count I of the amended complaint.

For the reasons set forth in its findings as to the facts in this matter, and in its order granting in part and denying in part various motions of the respondents, the Commission is of the opinion that the hearing examiner's

recommendations on the various motions involved in this exception are unwarranted except with respect to the motions for dismissal of the amended complaint as to respondents Shirley, Olcott, and Nichols. The general purpose and result of the combination and conspiracy engaged in by all the respondents was to fix and maintain prices on chain and chain products. The respondent manufacturers selling tire chain embodying the patented bar reinforced anti-skid feature conspired and agreed to fix and maintain the prices on that particular type of chain. This was only one of the means by which the objective of the over-all
1643 conspiracy was accomplished. The fact that the provisions in the license agreements between respondent American and its licensees relating to the maintenance of minimum prices and discounts were canceled does not serve to remove the illegality inherent in the arrangement, and affords no basis for exempting these particular acts and practices from the prohibitions of the order to cease and desist which the Commission has determined to issue in this matter.

While the evidence shows that Shirley, Olcott & Nichols did aid and assist certain of the respondents in acts and practices done and performed pursuant to the combination and conspiracy to fix and maintain prices on tire chain embodying the patented bar reinforced anti-skid feature, substantially as alleged in the amended complaint, it ap-
1644 pears that the arrangements between the respondents selling this particular type of chain and Shirley, Olcott & Nichols were terminated prior to the commencement of this proceeding; that respondent Shirley died on September 14, 1951, and the partnership of Shirley, Olcott & Nichols terminated on September 15, 1951; that there is no likelihood of such arrangements being resumed; and that, therefore, the public interest does not require that they be retained as respondents in this proceeding. These excep-

tions are denied insofar as they pertain to the motions for dismissal of the amended complaint as to respondents Shirley, Olcott, and Nichols, and otherwise granted.

4. Counsel supporting the complaint excepts to the hearing examiner's statement to the effect that respondent American forwarded its price lists and discount sheets to each of the respondent manufacturers who were and are its customers, for the reason that said price lists and discount sheets were sent by respondent American to all of its competitors. The evidence does not establish that respondent American forwarded its price lists and discount sheets 1646
to all of its competitors, but there is sufficient evidence to establish that such dissemination by respondent American was not confined to those competitors who were also customers of American. This exception is granted.

5. Counsel supporting the complaint excepts to the hearing examiner's failure to give evidentiary value to the letters written by George J. Campbell, Sr., which are in evidence in this proceeding. The hearing examiner stated that although the letters are entitled to some evidentiary value, their consideration leads into a highly controversial field, and that they are therefore disregarded. The Commission does not agree with the hearing examiner's action in this regard. The letters in question were written during the ordinary course of business by the president of one 1647
of the respondent corporations. He was also a trustee of the respondent Institute when a number of said letters were written. They were competent, relevant, and material and were properly admitted in evidence and should have been considered by the hearing examiner and given such weight as they were entitled to in the light of other evidence in the record. This exception is granted.

6. The hearing examiner allowed a finding requested by respondent Columbus McKinnon to the effect that said respondent did not use the Donley freight rate book in connection with its sale of welded chain or weldless chain. Counsel supporting the complaint in this exception contends that such finding is incorrect insofar as it applies to welded chain. The evidence in the record shows that respondent Columbus McKinnon manufactures and sells welded chain and that such chain is sold f.o.b. Pittsburgh, Pennsylvania. Said respondent was a member of the respondent Institute at the time Charles Donley was em-
1649 ployed to compile freight rates relating to welded chain, and as late as March 1, 1943, tariff sheets prepared by Donley were being mailed to respondent Columbus McKinnon and to other members of the Institute. While it is not conclusively shown that respondent Columbus McKinnon used the Donley freight rate book in the sale of welded chain, a finding that said respondent did not use such book is not warranted. This exception is granted.

EXCEPTIONS FILED BY ALL OF THE RESPONDENTS EXCEPT PYRENE, MCCANN, SHIRLEY, OLCOTT, AND NICHOLS

(The term "respondents" as hereinafter used in this group of exceptions does not include respondents Pyrene,
1650 McCann, Shirley, Olcott, and Nichols.)

1 and 2. In these exceptions respondents contend that neither the complaint nor the amended complaint in this proceeding complies with the provision of the Federal Trade Commission Act that proceedings by the Commission thereunder shall be in the public interest, and that the amended complaint purports to plead the existence of public interest, not factually but as a conclusion. These excep-

tions are without merit. Both the complaint and the amended complaint allege that the proceeding is in the public interest. The factual matters alleged in said complaints establish the public interest in this proceeding. These exceptions are denied.

3. This exception is to the hearing examiner's statement that "the business each respondent was engaged in" was "factually pleaded," on the ground that the amended complaint does not accurately aver the business each respondent was engaged in. The hearing examiner accurately describes the business of each of the respondents. It is immaterial that there are minor differences between the businesses actually engaged in and the averments of the amended complaint. This exception is denied. 1652

4. This exception is to the hearing examiner's statement in his summary of the charges in Count I of the amended complaint that "the objective of the conspiracy being effected by the common use of a price fixing formula by which identical delivered price quotations, terms, and conditions of sale for chain and chain products in the United States are fixed and maintained," for the reason that if the hearing examiner intended to imply that such charges were admitted, there is no such admission in the record; and that if the hearing examiner intended the statement as a finding, there is no support in the record for same. 1653 The Commission does not interpret the statement in which the above-quoted language appears as a finding by the hearing examiner based on either an admission by the respondents or evidence in the record, but rather as a summary of the charges in Count I of the complaint. This exception is therefore denied.

1654 *Order Disposing of Exceptions to Hearing Examiner's Recommended Decision.*

5. Respondents here except to the statement that "The related facts disclosed by the evidence conform to the allegations of the complaint in the previous stated respects * * *," for the reason that among the allegations of the complaint previously described, and apparently referred to by the hearing examiner, is the language quoted and excepted to in Exception No. 4 above. For the reasons stated in the ruling on Exception 4, this exception is denied.

6. Respondents except to the hearing examiner's use of the words "or the over-all conspiracy," for the reason that upon the whole record no conspiracy, over-all or otherwise,
1655 existed among the respondents or any of them. The Commission is of the opinion that the evidence in the record is to the contrary. This exception is denied.

7 and 8. Respondents here except to the hearing examiner's recommendations that the motions to dismiss the amended complaint filed by certain of the respondents be denied, contending (1) that upon the whole record there was no "unlawful enterprise" engaged in by the respondent Institute and/or its members; (2) that there is no evidence that any respondent knew of any "unlawful enterprise"; (3) that the authorities cited do not support the conclusions set forth; (4) that, upon the whole record, the motions mentioned should be granted. For the reasons
1656 set forth in its order disposing of various motions filed by the respondents and in its findings as to the facts in this proceeding, the Commission is of the opinion that the hearing examiner's recommendations with respect to said motions to dismiss are correct. These exceptions are therefore denied.

9. This exception is to the hearing examiner's recommendation that the separate motions of respondent Colum-

bus McKinnon to strike from the record certain exhibits and testimony be denied. Respondents contend that, upon the whole record, the evidence does not establish the existence of any conspiracy and that neither upon the whole record nor upon the record as it would be with the exhibits and testimony other than the exhibits prepared or written by respondent Columbus McKinnon disregarded does the evidence connect Columbus McKinnon with any conspiracy. This exception is substantially the same as the second exception to the hearing examiner's recommended decision filed by respondent Columbus McKinnon, and is denied for the same reason as that exception is denied. 1658

10 and 11. These exceptions are denied for the reason that the hearing examiner's statements to which they pertain can have no bearing on the final disposition of this proceeding.

12. This exception is to the hearing examiner's failure to include in his recommended decision the portion of respondents' proposed finding reading as follows:

> "Each of the foregoing types of chain had its own separate history of manufacturing and marketing development as hereinafter more fully set forth and to that extent constituted a wholly separate industry."

The Commission is of the opinion that the hearing examiner's description of the three different types of chain involved in this proceeding is adequate and that it was not error for him to omit the statement quoted. This exception is denied. 1659

13. Respondents here except to the hearing examiner's finding that "were it not for the price obstructions herein-

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after pointed out [each respondent manufacturer] would be in free and open competition with its natural competitors," for the reasons (1) that, upon the whole record, there were no "price obstructions" shown in this proceeding and (2) that the respondent manufacturers were in free, open, and active competition with each other, as to price and otherwise, at all times. After consideration of the entire record herein, the Commission is of the opinion that the evidence does not support respondents' contentions. This exception is therefore denied.

1661

14. This exception is to the hearing examiner's failure to include in his description of the activities of the respondent Institute the complete proposed findings requested by the respondents. Respondents contend that the portions of their proposed findings omitted by the hearing examiner are relevant and material to the issues of this proceeding, since they relate to the charges in the complaint pertaining to the exchange of information among the respondents and to specifications for tire chains. The Commission is of the opinion that the hearing examiner's recommended finding adequately describes the activities of the respondent Institute as disclosed by the record, and that he did not err in omitting the more detailed description of such activities requested by the respondents. This exception is therefore denied.

1662

15. This exception is to the hearing examiner's statement that "The Institute has carried on * * * other activities hereinafter referred to" to the extent that said statement is intended to refer to any statement, finding, or conclusion by the hearing examiner to which the respondents have taken exception. The hearing examiner's statement will have no bearing on the rulings on the various other exceptions filed by the respondents.

16. Respondents here except to the hearing examiner's topic heading reading as follows: "The Trade Practice Price Formulae Adhered to by Respondents, Supplemented by Tacit Agreements and Understandings." Respondents contend (1) that the record does not reveal the existence of any "Trade Practice Price Formulae," (2) that the language quoted is not fairly descriptive of the delivered price method of selling used in the chain industry, and (3) that the record discloses no "Tacit" (or other) "Agreements" or "Understandings." The Commission is of the opinion that the record herein establishes that the respondents used pricing formulae and that there were agreements and 1664
understandings between the respondents and that the topic heading to which this exception pertains is therefore not prejudicial. This exception is denied.

17, 18, 19, 20, 21, and 23. In these exceptions respondents contend that the hearing examiner's findings with respect to price leadership in the chain industry are incomplete as a result of his failure to include certain findings proposed by the respondents, and that the hearing examiner's findings are not in accordance with the evidence in the record insofar as the exchange of price lists and discount sheets is concerned. The Commission is of the opinion that the hearing examiner's findings to which these exceptions pertain are substantially in accord with and are supported by reliable, probative, and substantial evidence in the record, 1665
and that the respondents' proposed findings which were not adopted by the hearing examiner were either irrelevant or immaterial or not sustained by the evidence. These exceptions are therefore denied.

22. This exception is to the hearing examiner's finding that "Since January 1937 there has been only one decline in the published prices in the chain industry." Respond

ents contend that the hearing examiner's record citation does not support the finding because the witness who made the statement cited by the hearing examiner was talking only about welded chain and not about the whole chain industry, and further that the evidence shows a number of declines in published prices on welded chain and tire chains since 1935. The respondents' contentions appear to be substantially correct, and this exception is therefore granted.

24. Respondents except to the hearing examiner's state-
1667 ment that "Prices and discounts established by respondent American were the result of understandings with other respondent manufacturers as hereinafter set forth," for the reason that, upon the whole record, there were no such understandings. For the reasons set forth in its findings as to the facts and in the rulings on respondents' other exceptions herein, the Commission is of the opinion that the statement to which this exception pertains is warranted by the evidence in the record. This exception is therefore denied.

25. Respondents here except to the hearing examiner's action in disregarding certain evidence and his failure to adopt certain proposed findings of the respondents based on the evidence disregarded. The evidence disregarded
1668 by the hearing examiner was introduced by the respondents in an attempt to show that the uniformity of published prices in the chain industry is not the result of any unlawful actions by the respondents as alleged in the complaint, but rather that such uniformity has resulted from the fact that all types of chain are homogeneous articles.

The hearing examiner was of the opinion that such evidence when considered in relation to other evidence in the

record constitutes no valid defense. The Commission is of the view that while the uniformity of published prices when considered alone does not necessarily constitute evidence of collusion, the record in this case establishes that such uniformity of published prices in the chain industry resulted from unlawful acts and practices on the part of the respondents and that in view of such showing it was not improper for the hearing examiner to refuse to adopt the respondents' proposed findings based on such evidence. This exception is denied.

26 and 32. Respondents except to the language of the 1670
headings in the hearing examiner's recommended decision which read, "Understandings as to Future Prices and Price Maintenance Assistance Given by Respondent Merriman," "Understandings as to Future Prices," and "The Price Maintenance Assistance Given by Respondent Merriman," contending that, upon the whole record, there was no understanding as to prices and that there was no price maintenance assistance given by respondent Merriman. The Commission is of the opinion that the evidence cited by the hearing examiner in support of the various findings appearing under the headings to which these exceptions pertain and the whole record establish that the respondents did enter into understandings as to future prices and that respondent Merriman did lend price maintenance assistance. This exception is denied. 1671

27. Respondents here except to the hearing examiner's failure to adopt in its entirety the finding proposed by the respondent reading as follows: "Respondent Merriman has had no function, control or authority whatsoever in connection with the prices of chain and chain products and has never attempted to exercise any such functions, control or authority." The hearing examiner found that

respondent Merriman had no control or authority over prices of chain and chain products. It appears that the hearing examiner adopted as much of the proposed finding as was warranted by the evidence. As stated in the ruling on Exceptions 26 and 32, the evidence establishes that respondent Merriman did lend price maintenance assistance to members of the industry. In view of such showing, it was not improper for the hearing examiner to reject the portion of the proposed finding to which this exception pertains. This exception is denied.

1673 28. Respondents except to the hearing examiner's statement that respondent Merriman "went through the mills of American 'at frequent intervals'," on the grounds that the testimony of respondent Merriman is that he went through the mills of American Steel & Wire Company, his former employer, at frequent intervals. It appears that the hearing examiner's statement is subject to the interpretation that respondent Merriman went through the mills of respondent American Chain & Cable Company at "frequent intervals" and that the testimony does not support such a finding. This exception is granted.

29. This exception is to the hearing examiner's statement that "Other respondents testified that there were 'lots of discussions' during 'formal meetings' of increased costs
1674 of labor, materials and freight rates *with relation to published prices.*" Respondents contend that the portion of the record cited by the hearing examiner contains no evidence to support this statement. The Commission does not agree with respondents' contention. The testimony of witness Bond at pages 1108-10 of the transcript of testimony (not pages 1180-10, as appear in respondents' exceptions), as well as that of witness Kirkpatrick at pages 1330-1 and of witness Cull at page 1870 (instead of page

1871 as cited by the hearing examiner), and the whole record fully support the hearing examiner's statement. This exception is denied.

30. Respondents except to the hearing examiner's finding that "The evidence fairly establishes and it is so found as a fact, that current prices were discussed while the members were at Institute meetings, and that before and after the formal meetings were convened and adjourned, present and future prices were discussed and understandings arrived at with reference to continuance of, or changes in, current prices, which understandings were reflected in price lists thereafter issued by American." 1676 Respondents contend that the evidence does not support this finding and that the evidence cited by the hearing examiner in support of the finding either does not support same or was completely negatived by other evidence in the record. The Commission does not agree with respondent's contention as to the interpretation or weight which should be given evidence in the record bearing on this finding. For the reasons set forth in its findings as to the facts in this matter and in its rulings on various other exceptions filed by the respondents, the Commission is of the opinion that the hearing examiner's finding is substantially in accord with and supported by the greater weight of the evidence in the record. This exception is therefore denied.

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31. The hearing examiner, in a footnote in his recommended decision, states that—

> "The record contains a number of communications written by George J. Campbell, Sr., * * * former trustee of the Institute * * * and president of International Chain & Manufacturing Company, who died September 9, 1941, and who was not available as a witness when the hearings were held. No oppor-

tunity existed for any explanation of any of the statements in the communications or for cross-examination. Some of the statements appearing in his letters were conclusively shown to have been erroneous. If any of his statements should be given evidentiary value, and they are entitled to some, they strongly tend to establish price agreements at Institute meetings, but as their consideration leads into a highly controversial field, they are disregarded."

Respondents in this exception contend that said letters
1679 are not entitled to any evidentiary value in the face of the fact that the author was dead and not available to testify or be cross-examined, plus the fact that some of Campbell, Sr.'s statements in his letters were shown to have been erroneous, plus the fact that he was shown to have had a motive for making misstatements, and that said letters do not establish price agreements. The Commission does not agree with respondents' contention that the letters in question are not entitled to any evidentiary value, nor, although not involved in this exception, with the hearing examiner's action in disregarding this evidence. The letters in question were written during the ordinary course of business by the president of one of the respondent corporations. He was also a trustee of respondent Institute when a number of the letters were written. They are com-
1680 petent, relevant, and material and are of evidentiary value. This exception is denied.

33. The hearing examiner states in his recommended decision that "prior to the appointment of Mr. Merriman as managing director the Institute had experienced 'a hard time' " and cites page 2089 of the record in support of such statement. Respondents contend in this exception that no evidence in support of this statement appears at page 2089

of the record and that they are unable to find any evidence in the record in support of same. The evidence at page 2089 of the transcript of testimony does not support the hearing examiner's statement and for that reason this exception is granted.

34. This exception is to the hearing examiner's finding that—

> "There had been, and were then continuing, price wars, largely confined to the depression years, and to the sale of tire chains (not to jobbers, the usual sales channel) but to automotive chains and chain 1682
> stores such as Sears-Roebuck, who received lower prices than the jobbers, the cut in prices being reflected in higher discounts which at times amounted to as much as 80 percent of the published price. There had also been cutting of prices (failure to maintain the published prices and discounts) to the jobbers, resulting in part from the lower prices given the chain stores, which were likewise reflected in increased discounts."

Respondents contend that price wars were not "largely confined to the depression years" and were not "largely confined to the sale of tire chains," and that the evidence shows that there was extensive price cutting at all times on all types of chain. There is substantial evidence in 1683
the record that price wars were prevalent in the industry during the depression years. There is also considerable testimony by witnesses for the respondents that there was continuous price cutting on all types of chain. However, such testimony must be considered in the light of the stipulated facts with respect to sales in accordance with announced prices, and when so considered it is apparent that the hearing examiner's statement is substantially in accord-

ance with the evidence except that the conditions so described were not limited to tire chains. This exception is therefore granted insofar as the hearing examiner's finding limits the conditions described to tire chains, and is otherwise denied.

35. Respondents here except to the hearing examiner's statement that "This was understood by one respondent to be 'part of his job,'" contending that it is misleading to refer to this understanding by one Institute member without stating that a majority of other members, and
1685 Mr. Merriman himself, did not consider the checking on respondent's prices to be a part of his job. The Commission does not consider the hearing examiner's statement to be misleading. While, as respondents contend, there is testimony that others did not consider the checking or reporting of prices to be a part of Mr. Merriman's job, there is also testimony, other than that cited by the hearing examiner, that Mr. Merriman was hired for that purpose (R. 1880). This exception is denied.

36 and 37. The hearing examiner found that the price leadership plan adopted and followed by the respondents was known to Merriman, and in a footnote to the finding states that

> 1686 "Although Merriman did not testify as to his knowledge or lack of knowledge of the plan, it would be a serious reflection upon the intelligence of a man of his achievements and intimate knowledge of the chain industry to contend otherwise. It is an inescapable conclusion."

Respondents contend in these exceptions that there was no "price leadership plan" and that Merriman could not have known of any such plan. As has been stated in the rulings

on previous exceptions, the Commission is of the opinion that the evidence establishes that the respondents did adopt and follow a "price leadership plan," and the Commission agrees with the hearing examiner's conclusion with respect to Merriman's knowledge of same. These exceptions are denied.

38. Respondents except to the hearing examiner's statement that Merriman's personal philosophy was "known to the officers and members of the Institute at the time he was employed," on the ground that it is not supported by any evidence. It appears from the evidence that Merriman 1688
did have a strong personal philosophy concerning adherence to published prices. His qualifications were carefully inquired into before he was employed by the Institute. In an address to the members of the Institute prior to his employment, Mr. Merriman expressed his ideas with respect to price cutting. The hearing examiner's statement to which this exception pertains is warranted by the evidence. This exception is therefore denied.

39 and 40. In these exceptions respondents contend that the hearing examiner's findings that Merriman aided members "in detecting price cutters in their midst" and that "he contributed much to, and played an important part in furthering the plan designed to accomplish price uniformity in the chain industry," on the ground that they 1689
are not supported by the evidence. As has been previously stated in the rulings on other exceptions herein, the Commission is of the opinion that price uniformity in the chain industry resulted from unlawful actions on the part of the respondents rather than from a natural competitive situation as the respondents contend. The activities of respondent Merriman as set forth by the hearing examiner undoubtedly contributed to the maintenance of price uniformity in the industry. These exceptions are denied.

41. Respondents except to the hearing examiner's failure to include certain proposed findings by the respondents concerning discussions at Institute meetings of past and closed transactions; the uniformity of published prices; resale prices; and channels of distribution. The hearing examiner in his rulings on proposed findings allowed in part and rejected in part as either immaterial or not sustained by the evidence as a whole the findings to which these exceptions pertain. The various points raised by this general exception are also raised in various other of respondents' exceptions, and the Commission's rulings on
1691 such various other exceptions dispose of the issues raised in this general exception.

42. This exception is to the hearing examiner's use of the heading "Basing Point Systems," on the ground that the method used by the respondents in pricing tire chains cannot be characterized as a basing point system. This exception is granted.

43. Respondents except to the hearing examiner's failure to include certain findings proposed by the respondents to the effect that the three different delivered-price methods of selling used by the respondents were adopted by each respondent by entirely independent action and without any agreement whatsoever; have been maintained by entirely
1692 independent action and without any agreement or understanding; and have never been discussed between or among any of the respondents. The Commission is of the opinion that the record as a whole does not support the proposed findings involved in this exception and that therefore the hearing examiner did not err in refusing to adopt same. This exception is denied.

44. Respondents except to the hearing examiner's failure to adopt certain findings proposed by the respondents,

contending that said findings are supported by substantial evidence; are relevant and material to the subject matter of the hearing examiner's findings on the "Pittsburgh plus" method of selling welded chain; and that the hearing examiner's findings on said method are not complete without the inclusion of the findings proposed by the respondents. The proposed findings which the respondents contend should have been adopted pertain to the "Pittsburgh plus" method used by the respondents in the sale of welded chain and contain among other statements the statement that "There has been no collusion or concerted action of any kind among any of the respondents in either adopting or continuing 1694
to use the 'Pittsburgh-plus' method of selling welded chain." The hearing examiner's description of the "Pittsburgh plus" method of selling welded chain is in accordance with the facts stipulated between counsel and appears to be substantially complete. For the reasons stated in the rulings on other exceptions herein and in the findings as to the facts in this matter, the Commission is of the opinion that the findings proposed by the respondent to which this excepion pertains are not supported in their entirety by the greater weight of the evidence, and that therefore it was not error for the hearing examiner to refuse to adopt same. This exception is denied.

45. This exception is to the hearing examiner's statement to the effect that Charles Donley was employed in 1695
1933 to compile freight rates from Pittsburgh to various other destinations, for the purpose of insuring uniformity in computing prices under the "Pittsburgh plus plan." Respondents contend that there is no evidence in the record to support the hearing examiner's statement. Respondent Frank A. Bond, who is president of one of the corporate respondents, testified as follows:

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"* * * You see, the book was primarily gotten up during NRA to provide a uniformity of freight rates to use in quoting or filing a price with the Code Authority instead of everybody having—you can make some errors in these freight rates by getting hold of the wrong tariff, as I understand, sometimes; some clerk might make a mistake and get in the wrong tariff reference.

"Therefore, in order to obviate the possibility of mistakes, we decided to have one concern, and preferably a Pittsburgh institution, which we selected as
1697 Donley, already having been our traffic advisers, to compile this original NRA freight schedule book. Then everybody would be starting from scratch" (R. 2344).

This testimony plus other evidence in the record concerning the purpose and use by the respondents of the Donley freight rate book fully supports the hearing examiner's statement to which this exception pertains. This exception is denied.

46. Respondents except to the hearing examiner's failure to include respondents' proposed finding that Charles Donley as an independent traffic consultant "represents a number of clients in freight rate matters." The hearing examiner states that said Donley is "an independent traffic
1698 consultant." It is immaterial to the issues in this proceeding that said Donley represents a number of clients in freight rate matters, and it was not error for the hearing examiner to fail to include same in his findings. This exception is denied.

47. This exception is to the failure of the hearing examiner to include in his findings relating to the Donley freight rate book a proposed finding of the respondents that said

book has no relation to the sale of weldless or tire chain. The hearing examiner states that "the members of the Institute selling welded chain * * * employed Charles Donley * * * to compile freight rates relating to welded chain," and "the Institute has caused the book to be revised from time to time for the use of its members selling welded chains." The Commission is of the view that the hearing examiner has adequately described the purpose and use of the freight rate book and that he did not err by failing to name the products in connection with which the book was not used. This exception is denied.

48. Respondents except to the hearing examiner's failure 1700
to adopt their proposed findings to the effect that Donley, in addition to compiling the freight rate book, performed various other services for the Institute; that there was no agreement or understanding among the respondents that they would use the Donley freight rate book and that some of the respondents did not use such book. The Commission is of the opinion that the hearing examiner's findings with respect to the adoption and use of the Donley freight rate book are substantially in accord with the evidence in the record. It is not material that Donley also performed other services for the Institute or that said freight rate book was not used by certain of the respondents, that is, those respondents not selling welded chain. The proposed finding that there was no agreement 1701
or understanding in connection with the use of such freight rate book is not supported by the whole record. This exception is denied.

49. Respondents except to the hearing examiner's statement in a footnote in his recommended decision that a practice identical with that of the respondents of using a freight rate book in the manner described was condemned

in *Triangle Conduit & Cable Co. v. Federal Trade Commission.* Respondents contend that the court in that case did not "condemn" the furnishing of freight rate service but merely held that in conjunction with all the other facts and circumstances in that case the Commission was justified in finding that the freight rate service had been used in conjunction with a price fixing agreement. The Commission is of the opinion that the facts and circumstances in this case support a finding substantially the same as that in the case cited and that therefore the hearing examiner was warranted in pointing out the similarity of
1703 the use made of the freight rate books in the two cases. This exception is denied.

50. The hearing examiner, after describing the "freight equalization" method of selling weldless chain used by the respondents, states that there was no phantom freight in any of the sales by respondents Western, Russell, and Turner & Seymour. Respondents contend in this exception that the use of the freight equalization method of selling weldless chain did not involve use of phantom freight in any of the sales of weldless chain and that this fact should have been included in the hearing examiner's findings as requested by the respondents in their proposed findings. The hearing examiner's description of the freight equalization method of selling weldless chain employed by some
1704 of the respondents appears to be adequate and in accordance with the stipulated facts. This exception is denied.

51. Respondents except to the hearing examiner's failure to adopt in its entirety their proposed finding concerning the "freight equalization method" of selling weldless chain. The hearing examiner in his rulings on the respondents' proposed findings states that the finding involved in this exception was allowed in part and rejected in part. The

hearing examiner's findings with respect to the freight equalization method of selling weldless chain are in accordance with the stipulated facts. The principal portion of the respondents' proposed findings which was not adopted by the hearing examiner is to the effect that there was no agreement or understanding among the respondents as to their adoption and use of this method of selling. The Commission is of the opinion that this portion of the respondents' proposed finding is not sustained by the evidence and that the hearing examiner was warranted in refusing to adopt the proposed finding in its entirety. This exception is denied.

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52. Respondents except to the hearing examiner's failure to include in its entirety respondents' proposed finding as to the "universal delivered price method" of selling tire chains. The hearing examiner's findings with respect to the method employed by respondents in selling tire chains are in accordance with the stipulated facts. The hearing examiner allowed in part and rejected in part the proposed finding to which this exception pertains. The Commission is of the opinion that the evidence does not sustain that part of the respondents' proposed finding to the effect that this method of selling tire chains was adopted and used by each of the respondent manufacturers as a matter of independent business judgment and not as a result of any collusion with other respondents. It was not error for 1707
the hearing examiner to refuse to adopt the proposed finding in its entirety. This exception is denied.

53. Respondents except to the hearing examiner's use of the heading "The Net Price Stabilization Results Obtained Through Planned Concerted Action," contending that upon the whole record there is no evidence of price stabilization or of any planned concerted action. For the

reasons set forth in its findings as to the facts and in the rulings on various other of the exceptions filed by the respondents, the Commission is of the opinion that there is substantial evidence in the record of "planned concerted action" for the purpose of stabilizing prices. This exception is denied.

54. Respondents except to the hearing examiner's use of the phrase "between 80 and 95 percent" and the word "somewhat" in the following finding with respect to the uniformity of prices at which chain was sold by the
1709 respondents:

> "*Between 80 and 95 percent* of the sales of all the three kinds of chains sold by the respondent members during the period mentioned in the complaint were at uniform prices except during the depression years of 1932, the early part of 1933, 1936 and 1938, when the percentage of uniformity was *somewhat* less." (Italics added.)

The stipulated facts with respect to price uniformity are:

> "4. That counsel supporting the complaint contend that in an average of 95% of respondents' total sales of each of the three types of chain and chain products (i.e., welded, weldless and tire) during the period cov-
1710 ered by the complaint, respondents followed the pricing and selling practices hereinbefore set forth, whereas respondents, while conceding that said practices were followed, contend that they were followed in an average of only 80% of such total sales.
>
> 5. That the difference between the contentions of counsel supporting the complaint and the respondents herein with respect to said percentage figures of 95% and 80%, respectively, arises from the fact that approxi-

mately 20% of respondents' total sales, as evidenced by the invoices studied, were at prices or discounts or extras different from their published list prices, published list discounts, and/or published list extras; that counsel supporting the complaint concede that not over 5% of such total sales involved non-uniformity of prices among the respondents, and that the remaining 15% of such total sales represented sales to large buyers, including mail order houses and railroads, concerning which sufficient information is lacking (without extensive further study of invoices and the taking of testimony) to determine whether or not 1712
such instances involved non-uniformity of prices among the respondents.

6. That counsel supporting the complaint concede that, during the depressed business periods of 1932, the early part of 1933, and 1936 and 1938, respectively, the said estimated average percentage of respondents' total sales in which respondents followed the pricing and selling practices hereinbefore set forth was considerably lower than said 95%, and respondents contend that during said depressed business periods said estimated average percentage was considerably lower than said 80%."

In view of these facts, it was not in error for the hearing examiner to use the phrase "between 80 and 95 percent." 1713
However, his use of the word "somewhat" is not justified. This exception is therefore granted insofar as it pertains to the hearing examiner's use of the word "somewhat," and otherwise denied.

55. Respondents here contend that the hearing examiner's statement that the invoices which were introduced in evidence were "typical of all" is not correct, for the

reason that the invoices which were introduced were typical only of those invoices where the respondents had sold in accordance with their respective published prices and discount sheets. The stipulation in the record on which the hearing examiner's finding is based states that the invoices introduced in evidence "demonstrate the manner, form and substance of respondents' practices in making sales" of chain and chain products during the period covered by the complaint. There is nothing in the stipulation to indicate that the invoices introduced were not "typical of all." The Commission is of the opinion that the hearing
1715 examiner's statement is not erroneous. This exception is denied.

56. Respondents except to the hearing examiner's failure to include their proposed finding to the effect that respondents Turner & Seymour's and Russell's published discounts were not uniform with those of other respondents. While the respondents Turner & Seymour and Russell did not stipulate, as did the other respondent manufacturers, that their published discounts were identical with those of other respondents selling the same products, it does not appear that there is substantial evidence to support a finding such as that proposed by the respondents. This exception is denied.

1716 57. Respondents except to the hearing examiner's finding under the heading "Public Interest," contending that the conclusions set forth are not warranted by the evidence. The Commission does not agree with the respondents' contention and is of the opinion that the hearing examiner's finding is warranted by the evidence in this proceeding. This exception is denied.

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58. Respondents here except to the hearing examiner's failure to include respondents' proposed finding with respect to public interest, which proposed finding is to the effect that it would not be in the public interest to enter an order in this proceeding which would have the effect of requiring a relocation of the chain industry. It appears that the hearing examiner rejected the proposed finding to which this exception pertains as "immaterial in the light of recent court rulings." The Commission deems it to be in the public interest to issue an order to cease and desist adequate and appropriate to prevent a continuation of the unlawful acts and practices in which the respondents have engaged. The hearing examiner was warranted in rejecting respondents' proposed finding. This exception is denied.

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59. The respondents except to the hearing examiner's action in rejecting "as not the best evidence" or as "not the best and controlling evidence" or as "completely at variance with the convincing and controlling evidence" certain evidence relied upon by the respondents concerning the more important issues in this proceeding. Respondents' principal contentions are that the evidence so rejected by the hearing examiner is the best evidence; that it is not at variance with any other evidence but merely explanatory thereof and is at variance only with the hearing examiner's erroneous inferences from such other evidence. For the reasons set forth in the various other rulings on the respondents' exceptions and in the findings as to the facts which the Commission has determined to issue in this proceeding, this exception is denied.

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60 and 61. In these exceptions respondents contend that the hearing examiner erred in rejecting certain evidence for the reasons that the rejected evidence constitutes no defense or is immaterial in view of recent court decisions.

Respondents contend that the evidence rejected by the hearing examiner is relevant and material, and that the cases cited by the hearing examiner merely hold that the evidence therein adduced warranted the Commission in finding violations of the law, and did not hold that in making findings the Commission should reject or disregard evidence of the type here rejected by the hearing examiner. It does not appear that the hearing examiner disregarded the evidence with which these exceptions are concerned, but rather that he considered other evidence as controlling in view of the court decisions cited by him. However, to
1721 the extent that the hearing examiner may have disregarded relevant and material evidence in the record, this exception is granted. The Commission considered all such evidence in reaching its decision in this proceeding.

62 to 73, both inclusive. This group of exceptions pertains to the hearing examiner's findings with respect to the allegations in Count II of the amended complaint. The Commission has determined that the charges in Count II of the amended complaint should be dismissed as to all of the respondents. These exceptions are disposed of by such determination.

74 and 75. In these exceptions respondents contend that the hearing examiner's "Conclusions of Law" and "Con-
1722 clusions on Counts 1 and 2" are not supported by [illegible] contrary to the evidence and that the hearing [illegible] was in error in failing to include in his recommended decision the conclusions proposed by the respondents, which were, in effect, that the allegations of the amended complaint are not sustained. For the reasons stated herein in rulings on various other exceptions of the respondents, and in its findings as to the facts in this matter, the Commission is of the opinion that the hearing examiner's

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conclusions with respect to Count I of the amended complaint are in accordance with and supported by reliable, probative, and substantial evidence, and that the hearing examiner was not in error in refusing to adopt respondents' proposed findings to the contrary. These exceptions are therefore denied insofar as they pertain to the hearing examiner's conclusions with respect to Count I of the amended complaint. In view of the Commission's determination that Count II of the amended complaint should be dismissed as to all the respondents, these exceptions are granted insofar as they pertain to the hearing examiner's conclusions with respect to Count II of the amended complaint.

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76 and 77. These general exceptions of the respondents to the hearing examiner's rulings on the findings proposed by the respondents, to all of the hearing examiner's recommended findings and conclusions, and to the hearing examiner's failure to include in his recommended decision all of the proposed findings and conclusions requested by the respondents are disposed of by the rulings hereinabove on the respondents' various specific exceptions.

78 and 79. Respondents, in these exceptions, contend that the hearing examiner's recommended order, except insofar as it grants certain motions of the respondents and dismisses the complaint as to certain respondents, is not warranted, and that the hearing examiner should have recommended that the complaint be dismissed in its entirety as to all respondents. The Commission has determined that an order different from that recommended by the hearing examiner should be entered in this matter, and in making such determination these exceptions are disposed of.

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1726 *Order Disposing of Exceptions to Hearing Examiner's Recommended Decision.*

80. Exception is taken to the hearing examiner's statement in the "Amendment to Trial Examiner's Recommended Decision" to the effect that the Institute and its members "were engaged in an unlawful enterprise." As hereinabove stated, the Commission is of the opinion that the hearing examiner's statement is supported by substantial evidence in the record. This exception is denied.

EXCEPTIONS FILED BY RESPONDENTS AMERICAN, KIRKPATRICK, MCKAY, BOND, HODELL, ST. PIERRE, TAYLOR, SHIRLEY, OLCOTT AND NICHOLS

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1. In this exception these respondents join in and repeat the exceptions filed in behalf of all the respondents except Pyrene, McCann, Shirley, Olcott and Nichols, and the Commission's rulings hereinabove on such exceptions dispose of this exception.

2(a). In this exception it is contended that there is no evidence to support the hearing examiner's finding that the agreement between American and its licensees provided for the payment of a royalty on "the sale of unpatented chains." The hearing examiner's finding to which this exception pertains reads as follows: "The agreements provided for the payment of a 5 percent royalty and the sale
1728 of the unpatented chains with the patented devices at minimum prices and discounts fixed or to be fixed by American." The agreements themselves, copies of which are in the record, plus the stipulated facts concerning said agreements, fully support the hearing examiner's finding. This exception is denied.

2(b). This exception is to the hearing examiner's finding that respondent Shirley apportioned orders for tire chains

among such of the licensee group with which his firm at the time had contracts and the hearing examiner's intimation that bids by the manufacturing respondents were submitted in the name of Shirley and orders obtained by Shirley were apportioned among the manufacturing respondents. It is contended that the facts are that Shirley submitted his own bids in his own name, obtained such orders and filled them in his own behalf, in which connection he placed orders for tire chains with the manufacturing respondents. There is ample evidence in the record to support findings to the effect that bids submitted by Shirley, Olcott & Nichols were in fact bids of the said manufacturing 1730
respondents and that orders received by Shirley, Olcott & Nichols in response to such bids were apportioned among the various manufacturing respondents represented by Shirley, Olcott & Nichols. This exception is denied.

2(c) and (d). These exceptions are to the hearing examiner's intimation that the method employed by Shirley in submitting bids to the U. S. Treasury Department, Procurement Division, for tire chains to be obtained by him from the several manufacturing respondents with which he had contracts was a collusive method and that false certificates were attached to bids submitted by Shirley. It is contended that the facts regarding the relationship between Shirley and the several manufacturing respondents and between Shirley and the Government were fully known 1731
to the Treasury Department, Procurement Division, that the arrangement was to its benefit and was desired by it, and was made with its legal approval. It is also contended that the certificates submitted in connection with such bids were supplemented and explained by written statements forming part of such bids and modifying said certificates. The Commission is of the view that the findings to which

these exceptions pertain are fully supported by substantial evidence in the record. This exception is denied.

3. In this exception it is contended that the hearing examiner should not have given any consideration or probative value whatsoever to, or inserted any quotations from, Commission's Exhibit 942 A-B and 887 B. These exhibits were introduced in evidence without objection. They are relevant and material to the issues in this proceeding. The opinions expressed by the authors of these exhibits are not controlling in any respects, but it was not
1733 error for the hearing examiner to consider the facts set forth in such exhibits in relation to other evidence in the record. This exception is denied.

4 and 5. These exceptions involve the same considerations as Exceptions 2(c) and (d), and are denied for the same reasons that those exceptions were denied.

6. This exception is to all parts of the hearing examiner's conclusions and recommended order which are inconsistent with the other exceptions herein and the other exceptions filed on behalf of certain respondents. The Commission's rulings on such other exceptions dispose of this exception.

1734 EXCEPTIONS FILED BY RESPONDENT CHAIN INSTITUTE

1. This exception is to the hearing examiner's finding that current prices were discussed at Institute meetings and that understandings or agreements were reached either at, before, or after Institute meetings. It is contended that the evidence cited by the hearing examiner or other evidence in the record does not support such finding. The Commission is of the opinion that the documentary evidence cited by the hearing examiner and the

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so-called Campbell letters, which were erroneously disregarded by the hearing examiner, when considered in relation to the entire record fully support the hearing examiner's findings. This exception is denied.

2. This exception is to the hearing examiner's statement in a footnote in his recommended decision, "That the maintenance of current and changes in prices were the result of agreements * * *" and, by inference, that the Institute was in some way involved in these alleged agreements. The Commission is of the opinion that the statement in question is fully supported by the evidence in the record, including the so-called Campbell letters, and that the inference, if there is such, that the Institute was involved in such agreements is warranted. This exception is denied.

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3. In this exception it is contended that the hearing examiner found, in substance, that price leadership as practiced in the chain industry had been adopted as a "plan" and that the Institute and its managing director, respondent Merriman, had knowledge of it and were in some way responsible for the alleged plan, and that such finding is not supported by substantial evidence and is not in accordance with the greater weight of the evidence. The hearing examiner's finding to which this exception pertains is as follows:

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> "The price leadership plan adopted and followed by the members was known to Merriman who had developed a strong personal philosophy with reference to selling in accordance with published prices, which he impressed upon the members at meetings of the Institute, and which was known to the officers and members of the Institute at the time he was employed. By impressing upon the members his philosophical views--strict adherence to published prices and dis-

counts—and aiding them in detecting price cutters in their midst, he contributed much to, and played an important part in furthering the plan designed to accomplish price uniformity in the chain industry."

In a footnote to his finding the hearing examiner said:

"Although Merriman did not testify as to his knowledge or lack of knowledge of the plan, it would be a serious reflection upon the intelligence of a man of his achievements and intimate knowledge of the chain industry to contend otherwise. It is an inescapable
1739 conclusion."

As hereinabove stated in the rulings on other exceptions, the fact that the respondents adopted and followed by agreement a price leadership plan is shown by substantial evidence in the record. In view of respondent Merriman's activities in connection with price maintenance and his intimate knowledge of the industry, it is a reasonable inference that he had knowledge of the existence of the price leadership plan. This exception is denied.

4. This exception is to the examiner's finding with respect to the use of the Donley freight rate book and specifically to a statement, in a footnote to the finding, that "Apparently an identical practice was condemned
1740 in Triangle Conduit and Cable Co. v. F. T. C. * * *." As hereinabove stated in the rulings on other exceptions, the Commission is of the opinion that the hearing examiner's findings with respect to the adoption and use of the Donley freight rate book are supported by substantial evidence in the record. It was not error for the hearing examiner to point out the similarity of the use made of the freight rate books in the two cases. This exception is denied.

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5. This general exception to the hearing examiner's conclusion and order is disposed of by the rulings hereinabove on Exceptions 1 through 4.

EXCEPTIONS FILED BY RESPONDENT RUSSELL

1. This exception is to the hearing examiner's recommendation, and reasons therefor, that this respondent's motion that certain charges of the amended complaint be dismissed as to it be denied. The motion to which the hearing examiner's recommendation pertains is in effect that all of the allegations in the amended complaint concerning products which this respondent does not manufacture or sell and concerning acts, practices, and methods which it did not engage in, use, or employ, be dismissed as to this respondent. The Commission is of the opinion that the hearing examiner's recommendation was correct. The evidence establishes the existence of a combination and conspiracy in restraint of trade in connection with the sale of chain and chain products. This respondent's participation in such combination and conspiracy insofar as it pertained to the particular kind of chain manufactured and sold by it, is shown by substantial evidence in the record. The fact that this respondent did not manufacture or sell all of the products involved in this proceeding, and, therefore, did not engage in, use, or employ all the acts, practices, and methods by which the conspiracy was effectuated does not constitute sufficient grounds for dismissal as to it of the charges in the amended complaint relating to the acts or practices which it did not engage in or use. This exception is denied.

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2. This exception is to the hearing examiner's statement that this respondent manufactures and sells "the kind

of weldless chain known as sash and kindred chain." It is contended that sash and kindred chain is a separate type of chain from the weldless chain with which this proceeding is concerned. The hearing examiner, at various places in his recommended decision, recognizes that there is a distinction between the sash and kindred chain manufactured and sold by this respondent and certain other respondents and the so-called "weldless chain" manufactured and sold by certain of the respondents. He also recognizes, as is indicated by the findings mentioned by the respondent in support of this exception, that the manufacture and sale of
1745 sash and kindred chain is considered as a separate branch of the chain industry. These facts, however, do not detract from the hearing examiner's statement to the effect that sash and kindred chain is weldless chain. This exception is denied.

3. This exception is to the hearing examiner's statement to the effect that a prior agreement as to the maintenance of and changes in price was shown by "the systematic *pro forma* and prompt adoption of each changed price list as and when issued by American by each of the respondent manufacturers" and by "the prompt transmission by each respondent of its revised price list, to all other respondent manufacturers." It is contended that there is no evidence whatsoever that this respondent followed American on
1746 prices (i.e., net prices) or that it sent its price list to all the other respondents. The record contains a stipulation between counsel in which it was stipulated that if the president of this respondent were called to testify he would testify, among other things, that this respondent "has, in general, followed the prices set by American Chain Company on similar items although its increases have always lagged behind those of the American Chain Company and its prices have at times been lower." It is not shown that

this respondent has in all instances transmitted its revised price list to all the other respondent manufacturers. This exception is granted insofar as it implies that this respondent has in all instances transmitted its revised price list to all other respondent manufacturers, and otherwise denied.

4. This exception is to the hearing examiner's statement that "It is stipulated that the published list prices, published discounts therefrom and published list extras thereon for * * * weldless chain * * * of any of the respondent manufacturers were as published at the time by all other respondents selling such products" and that "This resulted from the agreed price leadership plan adopted and followed by all respondents." The stipulation on which the hearing examiner's finding as to the uniformity of respondents' prices, discounts, and list extras is based was not signed by this respondent. However, this respondent did stipulate that its published list prices were the same as those of other respondents who sold the same products and, as mentioned in the ruling on the preceding exception, there is evidence that this respondent has generally followed the prices set by respondent American on similar items. This exception is granted to the extent that the hearing examiner's finding indicates that this respondent stipulated that its published discounts were the same as those of the other respondent manufacturers, and otherwise denied. 1748 1749

5, 6, 7 and 8. This respondent in these exceptions contends that the hearing examiner's conclusions, insofar as they apply to it, are unsupported by the evidence, contrary to the facts and law, and contrary to the greater weight of the evidence. These general exceptions are disposed of by the rulings on the various other exceptions filed by this respondent.

9 and 10 (Respondents' exceptions 1 and 2 to amendment to hearing examiner's recommended decision). These exceptions involve the same points as are involved in the other exceptions filed by this respondent, and the rulings on such other exceptions dispose of these exceptions.

In addition to the above exceptions to the hearing examiner's recommended decision and amendment thereto, this respondent excepts to the hearing examiner's failure to allow and adopt as his own substantially all of the proposed findings, conclusion, and order requested by this respondent. It appears that the proposed findings, conclusion, and
1751 order requested by this respondent do not comply with Rule XXI of the Commission's rules of practice, in that they do not contain exact references to the record, or any references at all. However, the Commission has considered said proposed findings, conclusion, and order and the hearing examiner's rulings thereon, and, except to the extent that the hearing examiner's rulings may be inconsistent with the Commission's rulings on the various other exceptions herein, the Commission adopts as its own the hearing examiner's rulings on the proposed findings, conclusion, and order of this respondent.

EXCEPTIONS FILED BY RESPONDENT TURNER & SEYMOUR

1752 The exceptions filed by this respondent are substantially the same as those filed by respondent Russell. The evidence in the record relating to the activities of this respondent is substantially the same as that relating to the activities of respondent Russell. The rulings on the exceptions filed by respondent Russell dispose of the exceptions filed by this respondent.

EXCEPTIONS FILED BY RESPONDENT COLUMBUS MCKINNON

1. This exception is to the hearing examiner's recommendation that the motion of this respondent for dismissal of the amended complaint as to it be denied. It is contended that even if the Institute and its members were engaged in an unlawful enterprise, which this respondent denies, there is no evidence to support the hearing examiner's statement that this respondent knew or should have known of such illegal enterprise, and that mere membership in an association alone, without guilty knowledge, is not enough.

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As stated hereinabove in the rulings on other exceptions, the Commission is of the opinion that the evidence establishes that the respondents herein have engaged in unlawful activities. Respondent Columbus McKinnon, in addition to being an active member of the Institute during all of the time covered by the amended complaint, used the same pricing methods in the sale of welded chain and tire chain as did the other respondents, and its prices on products comparable to products sold by its competitors were the same as those of its competitors. Price lists were exchanged with competitors. In view of these facts and the entire record in this proceeding, the Commission is of the view that the hearing examiner's recommendation with respect to the aforesaid motion of this respondent is proper. This exception is denied.

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2. This exception is to the hearing examiner's recommendation that this respondent's motion to strike from the record all exhibits and testimony other than the exhibits prepared or written by it be denied. It is contended that there is no independent evidence to connect this respondent with any alleged conspiracy. As stated in the rulings on

various other exceptions of the respondents, the Commission is of the opinion that the evidence establishes that a conspiracy did exist and, as stated in the ruling in the preceding exception, there is sufficient evidence to show that this respondent was a party to the conspiracy. It is not necessary that this respondent's participation in the conspiracy be proven only by exhibits or testimony prepared or given by it. The hearing examiner's recommendation that the aforesaid motion be denied is therefore proper. This exception is denied.

1757 3. This exception is to the hearing examiner's finding that "Prices and discounts established by respondent American were the result of understandings with other respondent manufacturers • • •." This respondent contends that there is no proof that it had any understanding with American and the fact that similarity of prices existed is no basis upon which to make a finding that there was an understanding. The Commission is of the view that the hearing examiner's finding is supported by substantial evidence in the record. Price uniformity was only one of the facts considered in reaching this decision. This exception is denied.

4. This exception is to the hearing examiner's findings under the heading of "Understandings as to Future Prices" 1758 and particularly to the finding that current prices were discussed while the members were at Institute meetings and that before and after the formal meetings were convened and adjourned, present and future prices were discussed and understandings arrived at with reference to continuance of, or changes in, current prices, which understandings were reflected in price lists thereafter issued by American. This respondent contends that there is no evidence that any of its representatives ever discussed

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prices at Institute meetings or at any other time. The hearing examiner's finding is fully supported by evidence in the record, some of which is cited in his footnotes. This is only one of the means by which the over-all conspiracy was effectuated. Since, as stated hereinabove, this respondent was a party to the over-all conspiracy, it is not necessary to establish that it participated in each of the acts by which the conspiracy was effectuated. This exception is denied.

5. This exception is to the hearing examiner's findings under the heading "The Price Maintenance Assistance Given by Respondent Merriman," on the ground that the conclusions stated therein are unwarranted and erroneous. This general exception is denied for reasons stated hereinabove in connection with the rulings on various other exceptions filed by the respondents.

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6. This exception is to the hearing examiner's statement that this respondent admits that the facts set forth in Paragraphs Nine, Ten and Eleven of a certain stipulation as to the facts which was not signed by this respondent are true, and to the statement that the rejection by this respondent of Paragraph Eight of said stipulation was immaterial because this respondent knew that all the other respondents were using the same system. The hearing examiner's statements as to the admissions of this respondent are not entirely accurate. This respondent did not sign the so-called main stipulation, but instead stipulated that "duly qualified witnesses who are representatives of those respondents who signed the" main stipulation if called as witnesses would testify to the same effect as the language appearing in certain portions of the main stipulation, including Paragraphs Nine, Ten and Eleven, in which paragraphs the different methods of selling used by the re-

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spondent manufacturers are set forth. The Commission agrees with the hearing examiner's statement as to the immateriality of this respondent's rejection of Paragraph Eight of the main stipulation. It is a reasonable inference that this respondent knew that all other respondents selling similar products were using the same pricing methods. This exception is granted to the extent that the hearing examiner's statements as to this respondent's admissions are inaccurate, and otherwise denied.

7. This exception is to the hearing examiner's findings
1763 as to the compilation and use of the Donley freight rate book, on the ground that the hearing examiner allowed a proposed finding by this respondent that it "did not use the Donley freight rate book in its sales of welded chain or weldless chain." No record citations were given by the respondent in support of the above-quoted proposed finding which was allowed by the hearing examiner. The hearing examiner's findings as to the compilation and use of the Donley freight rate book are supported by substantial evidence in the record, including the so-called main stipulation as to the facts. Although this respondent did not sign that stipulation, it did stipulate as set forth in the preceding exception. This respondent sold its welded chain on an f.o.b. Pittsburgh basis. This respondent was a member of the Institute, and a representative of this
1764 respondent was present at a meeting held on January 20, 1936, when it was voted to continue the services of Mr. Donley. As late as March 1, 1943, this respondent was receiving tariff sheets directly from Charles Donley. In an affidavit of a vice-president of this respondent, the statement is made that no commercial freight rate service is used in connection with the sale of weldless chain, but there is no such statement with respect to welded chain. In view of these facts and the absence of any evidence that

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this respondent did not use the Donley freight rate book, the Commission is of the opinion that the hearing examiner should not have allowed the proposed finding quoted above, and that this exception to the hearing examiner's finding concerning the compilation and use of said freight rate book is without merit. This exception is denied.

8. This exception is to the hearing examiner's finding under the heading "The Net Price Stabilization Results Obtained Through Planned Concerted Action," on the grounds that this respondent did not sign the stipulation referred to therein and that its price on its patented tire chains was always different from the price of tire chains sold by other respondents. The hearing examiner's finding clearly shows that this respondent did not sign the so-called main stipulation. This respondent did stipulate, however, that substantially all of its sales during the period covered by the amended complaint were at the prices contained in its published price lists and published discounts therefrom. This respondent's prices were substantially the same as those of the other respondents on comparable products. This exception is denied.

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9. This exception is to the hearing examiner's finding with respect to the public interest in this proceeding. It is contended that the finding is wholly unsupported by the evidence and is unwarranted and erroneous. For the reasons set forth in the rulings on various other exceptions herein and in the Commission's findings as to the facts in this proceeding, the Commission does not agree with this respondent's contention. This exception is denied.

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10. This exception to the hearing examiner's action in disregarding and rejecting certain evidence is disposed of by the rulings hereinabove on Exceptions 59, 60 and 61.

filed by all of the respondents except Pyrene, McCann, Shirley, Olcott and Nichols.

11. This exception is to the hearing examiner's finding in Paragraph Six of Count II, on the ground that this respondent did not sign the stipulation referred to therein. The Commission's determination that Count II of the amended complaint should be dismissed as to all the respondents disposes of this exception.

12 and 13. These two general exceptions to the hearing examiner's conclusions are denied for the reasons stated
1769 hereinabove in the rulings on various other exceptions filed by the respondents.

14. This exception is to the hearing examiner's rejection of various findings proposed by this respondent. The Commission has considered each of the proposed findings submitted by this respondent and the hearing examiner's rulings thereon, and except to the extent that the hearing examiner's rulings may be inconsistent with the Commission's rulings on the various other exceptions herein, the Commission adopts as its own the hearing examiner's rulings on the proposed findings submitted by this respondent.

1770 15. This exception is to the hearing examiner's statement to the effect that this respondent did not join in the findings requested by all of the respondents. It appears that although this respondent submitted separate proposed findings and conclusions, it also joined in the proposed findings of facts, conclusions, and order submitted on behalf of all of the respondents. This exception is granted.

16. This exception to the hearing examiner's recommended order is substantially the same as Exception 78

Order Disposing of Exceptions to Hearing Examiner's Recommended Decision. 1771

filed by all the respondents except Pyrene, McCann, Shirley, Olcott and Nichols, and is disposed of by the ruling on that exception.

The Commission having duly considered the exceptions to the hearing examiner's recommended decision filed by counsel supporting the complaint and by all the respondents except Walter S. McCann and Pyrene Manufacturing Company, and the record herein, and being now fully advised in the premises:

IT IS ORDERED that said exceptions to the hearing examiner's recommended decision be, and they hereby are, granted or denied to the extent and in the manner hereinabove indicated. 1772

By the Commission, Commissioner Carretta not participating for the reason that oral argument on the merits was heard prior to his appointment to the Commission.

D. C. DANIEL,
Secretary.

(Seal)

ISSUED: February 16, 1953

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Findings as to the Facts and Conclusion.

Pursuant to the provisions of the Federal Trade Commission Act and to the provisions of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (Clayton Act), as amended by an Act of Congress approved June 19, 1936 (Robinson-Patman Act), the Federal Trade Commission, on October 9, 1945, issued and subsequently served its amended complaint in this proceeding upon the respondents named in the caption hereof, charging them in Count I thereof with the use of unfair methods of competition and unfair and deceptive acts and practices in
1775 commerce in violation of the provisions of the Federal Trade Commission Act and charging certain of them in Count II thereof with discriminations in price in violation of the provisions of subsection (a) of Section 2 of the said Clayton Act as amended, in the sale of chain and chain products, said amended complaint being issued in the place of and instead of the complaint against the same respondents issued on December 22, 1942.

After the issuance of the said amended complaint and the filing of respondents' answers thereto, testimony and other evidence in support of and in opposition to the allegations of said amended complaint were introduced before a hearing examiner of the Commission theretofore duly designated by it, and the said testimony and
1776 other evidence were duly recorded and filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission on the complaint, the answers thereto, testimony and other evidence, recommended decision of the hearing examiner and exceptions thereto, briefs in support of and in opposition to the complaint, and oral arguments of opposing counsel; and the Commission, having duly

considered the matter and having entered its order disposing of the exceptions to the recommended decision of the hearing examiner and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

Finding As to the Facts.

Paragraph One: (1) Respondent Chain Institute, Inc., a trade association (sometimes hereinafter referred to as "Institute"), is a corporation organized and existing under the laws of the State of Delaware, with its principal office at 208 South La Salle Street, Chicago, Illinois. It was first organized in June 1933. 1778

(2) Respondent American Chain & Cable Company, Inc. (sometimes hereinafter referred to as "American") is a corporation organized and existing under the laws of the State of New York, with its principal office at Bridgeport, Connecticut, and its general office at 230 Park Avenue, New York, New York. Said respondent manufactures and sells welded, weldless, and tire chain. It has a plant located at East Princess and Charles Streets, York, Pennsylvania, where it manufactures welded, weldless, and tire chain and a plant at Braddock, Pennsylvania, where it manufactures welded chain. Respondent American joined the Chain Institute in June 1933 and continuously since that time has been a member of the said Institute. 1779

(3) Respondent Bridgeport Chain & Manufacturing Company (sometimes hereinafter referred to as "Bridgeport") is a Connecticut corporation, with its principal office and plant at 964 Crescent Avenue, Bridgeport, Connecticut. It manufactures and sells weldless chain and also sells welded and tire chain.

(4) Respondent The McKay Company (sometimes hereinafter referred to as "McKay") is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal office located at McKay Building, Pittsburgh, Pennsylvania. Said respondent manufactures and sells welded, weldless, and tire chain. It has a plant at York, Pennsylvania, where it manufactures welded, weldless, and tire chain, and a plant at McKees Rocks, Pennsylvania, where it manufactures welded chain. Respondent McKay joined the respondent Institute in June 1933 and continuously since that time has been a member of the said Institute.

1781 (5) Respondent Pyrene Manufacturing Company (sometimes hereinafter referred to as "Pyrene") is a corporation organized and existing under the laws of the State of Delaware, with its principal office located at 560 Blmnt. Avenue, Newark, New Jersey, and plant at Empire Street, Newark, New Jersey. During the period covered by the amended complaint it manufactured and sold tire chain. This respondent sold its tire chain manufacturing facilities to The Newark Chain Company as of April 30, 1948. Respondent Pyrene joined the respondent Institute in June 1933 and was continuously a member of said Institute during the period covered by the amended complaint.

(6) Respondent Hodell Chain Company (sometimes
1782 hereinafter referred to as "Hodell") is a corporation organized and existing under the laws of the State of Ohio, with its principal office located at 3924 Cooper Avenue, Cleveland, Ohio. Said respondent was organized in 1893 and, until July 1, 1936, traded under the name and title "Chain Products Company." Prior to using this name, said respondent was known as the Cleveland Galvanizing Company. Said respondent has a plant in Cleveland, Ohio. It manufactures and sells welded, weldless, and tire chain.

Said respondent joined the respondent Institute in 1935, and resigned therefrom in 1939.

(7) Respondent St. Pierre Chain Corporation (sometimes hereinafter referred to as "St. Pierre") is a corporation organized and existing under the laws of the State of Massachusetts, with its principal office and plant located in Worcester, Massachusetts. It manufactures and sells tire chain. Said respondent joined the respondent Institute in June 1933 and continuously since that time has been a member of said Institute.

(8) Respondent S. G. Taylor Chain Company (sometimes hereinafter referred to as "Taylor") is a corporation organized and existing under the laws of the State of Illinois, with its principal office located at 3-141st Street, Hammond, Indiana, and plant in Hammond, Indiana. It manufactures and sells welded and tire chain and also sells weldless chain. Said respondent joined respondent Institute in June 1933 and continuously since that time has been a member of said Institute. 1784

(9) Respondent Cleveland Chain & Manufacturing Company (sometimes hereinafter referred to as "Cleveland") is a corporation organized and existing under the laws of the State of Ohio, with principal office and plant located at Broadway and Henry Streets, Garfield Heights, Cleveland, Ohio. It manufactures and sells welded, weldless, and tire chain. Said respondent joined the respondent Institute in June 1933 and continuously since that time has been a member of said Institute. 1785

(10) Respondent Columbus McKinnon Chain Corporation (sometimes hereinafter referred to as "Columbus McKinnon") is a corporation organized and existing under the laws of the State of New York, with principal office and

plant located at Tonawanda, New York. It manufactures and sells welded and tire chain and also sells weldless chain. Said respondent joined the respondent Institute in June 1933 and continuously since that time has been a member of said Institute.

(11) Respondent Campbell Chain Company (formerly International Chain & Manufacturing Company, and sometimes hereinafter referred to as "International") is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal office and plant located at Norway and Elm, York, Pennsylvania. It manufactures and sells welded, weldless, and tire chain.
1787 Said respondent joined the respondent Institute in June 1933, resigned therefrom on June 17, 1939, rejoined on June 15, 1940, and continuously since the latter date has been a member of said Institute.

(12) Respondent Nixdorff-Krein Manufacturing Company (sometimes hereinafter referred to as "Nixdorff-Krein") is a corporation organized and existing under the laws of the State of Delaware, with its principal office located at 900 Howard Street, St. Louis, Missouri, and plant at St. Louis, Missouri. It manufactures and sells welded and tire chain and also sells weldless chain. Said respondent joined the respondent Institute in June 1933 and continuously since that time has been a member
1788 of said Institute.

(13) Respondent Peerless Chain Company (sometimes hereinafter referred to as "Peerless") is a corporation organized and existing under the laws of the State of Minnesota, with its principal office and plant located at Winona, Minnesota. It manufactures and sells welded, weldless, and tire chain. Said respondent began to manufacture weldless chain in 1941; prior to that time it sold

weldless chain manufactured by others. Said respondent joined the respondent Institute in July 1933 and continuously since that time has been a member of said Institute.

(14) Respondent Round California Chain Company (sometimes hereinafter referred to as "Round California") is a corporation organized and existing under the laws of the State of California, with its principal office and plant located on Bay Shore Highway, South San Francisco, California. It manufactures and sells welded chain and also sells weldless and tire chain.

(15) Respondent The John M. Russell Manufacturing Company, Inc. (named in the complaint as J. M. Russell 1790
Manufacturing Company, and some time hereinafter referred to as "Russell") is a corporation organized and existing under the laws of the State of Connecticut, with its principal office and plant located at Naugatuck, Connecticut. It manufactures and sells the type of weldless chain known as sash and kindred chain. Said respondent joined the Sash and Kindred Chain Group of respondent Institute in July 1933 and continuously since that time has been a member of the said Group of said Institute.

(16) Respondent Seattle Chain & Mfg. Company (sometimes hereinafter referred to as "Seattle") is a corporation organized and existing under the laws of the State of 1791
Washington, with principal office and plant at 6921 East Marginal Way, Seattle, Washington. It manufactures and sells welded chain and also sells weldless and tire chain.

(17) Respondent Turner & Seymour Manufacturing Company (sometimes hereinafter referred to as "Turner & Seymour") is a corporation organized and existing under the laws of the State of Connecticut, with principal

office and plant at Torrington, Connecticut. It manufactures and sells the type of weldless chain known as sash and kindred chain. Said respondent joined the Sash and Kindred Group of said respondent Institute in July 1933 and continuously since that time has been a member of said Group of said Institute.

(18) Respondent Western Chain Products Company (sometimes hereinafter referred to as "Western") is a corporation organized and existing under the laws of the State of Illinois, with its principal office and plant located at 1807 West Belmont Avenue, Chicago, Illinois. It manu-
1793 factures and sells welded, weldless, and tire chain. Said respondent began the manufacture of weldless chain in 1945; prior to that time it sold weldless chain manufactured by others. Said respondent joined the respondent Institute in July 1933 and continuously since that time has been a member of said Institute.

(19) Respondent Woodhouse Chain Works (sometimes hereinafter referred to as "Woodhouse") is a corporation organized and existing under the laws of the State of New Jersey, with principal office and plant at 251 Third Street, Trenton, New Jersey. It manufactures and sells welded chain and also sells weldless and tire chain. Said respondent joined respondent Institute in June 1933 and continuously since that time has been a
1794 member of said Institute. Respondent Woodhouse was purchased by respondent Cleveland in 1947.

(20) Respondent Dennis A. Merriman, an individual (sometimes hereinafter referred to as "Merriman") has been managing director of respondent Institute since August 1, 1938, with office located at 208 South La Salle Street, Chicago, Illinois.

(21) Respondent Walter S. McCann, an individual (sometimes hereinafter referred to as "McCann"), was secretary and treasurer of respondent Institute during part of the period covered by the amended complaint, with office located at 208 South La Salle Street, Chicago, Illinois. Respondent McCann died on May 19, 1945. As hereinafter used, the term "respondents" does not include McCann.

(22) Respondent Wm. D. Kirkpatrick, an individual (sometimes hereinafter referred to as "Kirkpatrick"), is vice-president of respondent American, and from 1942 to 1944 was president of respondent Institute. Since June 1796
1938 he has represented respondent American in its membership in respondent Institute, and as such representative of respondent American has attended meetings of representatives of other members, and in that capacity served on committees of respondent Institute, wrote and otherwise communicated with other representatives of members of respondent Institute concerning action of the Institute, its officials, and members.

(23) Respondent Frank A. Bond, an individual (sometimes hereinafter referred to as "Bond"), is executive vice-president and secretary of respondent McKay, with office located at McKay Building, Pittsburgh, Pennsylvania. Since 1933 he has represented respondent McKay in its membership in respondent Institute, and as such 1797
representative of McKay has attended meetings of representatives of other members, and in that capacity served on committees of respondent Institute, wrote and otherwise communicated with other representative of members of respondent Institute concerning action of the Institute, its officials, and members. He has continuously since June 1933 served as chairman of the Traffic Committee of said Institute in dealing with freight rate matters.

1798 *Findings as to the Facts and Conclusion.*

(24) Respondent George J. Campbell, Jr., an individual (sometimes hereinafter referred to as "Campbell"), is, and has been since September 1941, president of respondent International, with offices located at the principal place of business of respondent International in York, Pennsylvania. From November 1942 to November 1944 he served as vice-president of respondent Institute. Since September 1941 he has represented respondent International in its membership in respondent Institute and as such representative of respondent International has attended meetings of representatives of other members and in that capacity served on committees of
1799 respondent Institute and wrote and otherwise communicated with other representatives of members of respondent Institute concerning action of the Institute, its officials, and members. George J. Campbell, Sr., was president of respondent International from 1922 to September 9, 1941, when he died. From June 19, 1933, to June 17, 1939, and from June 15, 1940, to September 9, 1941, he represented respondent International in its membership in respondent Institute, and as such representative of respondent International attended meetings of representatives of other members and in that capacity served on committees of respondent Institute and wrote and otherwise communicated with other representatives of members of respondent Institute concerning action of the Institute, its officials, and members.

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(25) Respondent Alfred Peter Shirley, an individual (sometimes hereinafter referred to as "Shirley") was, during the period covered by the amended complaint, an engineer and manufacturers' sales representative and was a partner in the firm of Shirley, Olcott & Nichols, with offices in the Mills Building, Washington, D. C. Respondent Shirley died on September 14, 1951.

(26) Respondent Floyd B. Olcott (sometimes hereinafter referred to as "Olcott") is an individual residing at 7828 Orchid St., N. W., Washington, D. C., who is an engineer and manufacturers' sales representative and was a partner in the firm of Shirley, Olcott & Nichols, which maintained its offices in the Mills Building, Washington, D. C.

(27) Respondent Forrest C. Nichols (sometimes hereinafter referred to as "Nichols") is an individual residing at 4702 Quebec Place, Washington, D. C., who is an engineer and manufacturers' sales representative and was a partner in the firm of Shirley, Olcott & Nichols, 1802
which maintained its offices in the Mills Building, Washington, D. C.

As hereinabove stated, respondent Shirley died on September 14, 1951. The partnership of Shirley, Olcott & Nichols was terminated on September 15, 1951. The arrangements between certain of the respondent manufacturers and Shirley, Olcott & Nichols relating to the sale of tire chain to the United States Government, all as described hereinafter, were terminated prior to the issuance of the original complaint herein. It does not appear that there is any likelihood that the arrangements may be resumed. The Commission is of the opinion that, under the circumstances, the amended complaint should be dismissed as to the respondents Shirley, Olcott, and 1803
Nichols. As hereinafter used, the term "respondents" does not include respondents Shirley, Olcott, and Nichols.

Respondents Cleveland, Seattle, Round California, and Bridgeport are affiliated through common ownership of the controlling capital stock of each of said respective corporations. L. D. Cull is Chairman of the board of directors of each of said four corporations. Through his representation of respondent Cleveland and its mem-

bership in respondent Institute, he also represented Seattle, Round California, and Bridgeport, and their interests, at meetings of members of the respondent Institute and in other activities of the Institute. Each of these affiliated companies (now also including respondent Woodhouse) in addition to its own products merchandises products of the others, and there are actual transactions of purchase and sale between them.

Each of the respondents described in this Paragraph, subparagraphs (2) to (19), inclusive, sometimes hereinafter referred to as respondent manufacturers, was, during the period covered by the amended complaint, engaged
1805 in the manufacture and sale of chain and chain products. The respondent Institute, described in subparagraph (1), and the individual respondents described in subparagraphs (20), (22), (23), and (24) have participated in the cooperative and collective action of all the respondents herein in the formation of and putting into operation and making effective the methods, systems, practices, and policies hereinafter described.

PARAGRAPH TWO: Respondent manufacturers produce various types of steel, alloy-steel, and other metallic chain and chain parts. The principal types of chain involved are welded chain, weldless chain, and tire chain.

Welded chain is so designated because each link is
1806 closed and sealed through welding. It includes chain of various sizes and weights for many uses, such as anchor chains, log chains, tie chains (for securing dairy cows at stanchions), tie-out chains (for use in securing cows and other animals for grazing, etc.), and trace chains (for harnessing teams and for other agricultural uses). Since the development of the art of electric welding the welded chain industry has used it for the mass production of welded chain. In the trade, most welded chain is also

referred to as commercial chain and pound chain. Such welded chain is priced by the manufacturers on a per pound basis.

Weldless chain is for the most part light in weight and, in general is used where the stronger chain is not required. Weldless chain is classified by the trade into two principal types: (1) Ordinary weldless chain, which is made by bending wire into the form of links and knotting, rather than welding; this type of weldless chain is used as cow ties, porch swing chain, well chain, dog leads, animal trap chains, and for many other purposes; (2) sash and kindred chain, which is made by stamping or cutting the links from flat metal strip stock; this type of weldless chain is used 1808 as window sash chains, transom chains, ships' telegraph chain, and for many other purposes.

Tire chains are made by the welding process, but are so linked as to form two line chains connected by cross chains at equal distances so that they may be attached around the wheels of motorized equipment, including automobiles, trucks, and farm tractors. In the early days, side chains were weldless and cross chains were welded, but now side chains are welded also. Tire chain is sold to a different class of customers than either welded or weldless chain.

Respondent manufacturers in the course and conduct of their business manufacture, sell, and distribute substantially all the welded chain, weldless chain, including sash 1809 and kindred chain, and tire chain produced in the United States. There are some manufacturers of these products who are not members of respondent Institute and who are not respondents in this proceeding. One witness estimated that the manufacturers who are not members of the Institute produce 15 percent of all the chain and chain products produced in the United States. The respondent manufacturers sell such products at various points throughout the

United States to wholesalers, dealers, and consumers, including the United States Government, and when sales are made, respondent manufacturers have regularly shipped, and do ship, said products to the purchasers at points in the several States of the United States and the District of Columbia other than in the States of origin of the shipment. They are engaged in commerce, in selling and shipping said products, within the meaning of the term "commerce" as defined in the Federal Trade Commission Act.

The respondent manufacturers were, and are, in active competition with one another and with other members of the chain industry in making and seeking to make sales of
1811 their products in trade and commerce between and among the several States of the United States and in the District of Columbia, except to the extent that such competition has been restrained, lessened, or destroyed as hereinafter set forth.

PARAGRAPH THREE: Welded chain has been generally quoted and sold on the basis of delivered prices computed by adding, to a basic price f.o.b. manufacturers' or sellers' plant an amount equal to the rail freight applicable to the particular shipment from Pittsburgh, Pennsylvania, to the point of delivery, irrespective of the point from which shipment was made. Such method of computing delivered prices is sometimes referred to as the "Pittsburgh plus," or single basing point delivered-price method or system.
1812 Under this method or system of pricing and selling the cost to a buyer was the seller's f.o.b. plant price plus an amount equal to the rail freight from Pittsburgh to the buyer's destination. In instances where the seller shipped welded chain freight collect, the buyer paid the carrier the actual amount of the freight from the seller's shipping point to the buyer's destination, but an adjustment was made on the invoice for the difference between the actual

freight paid and the rail freight from Pittsburgh to the buyer's delivery point. If the seller prepaid the freight, the seller collected from the buyer an amount equal to the rail freight from Pittsburgh to the buyer's delivery point. Consequently, in instances where the actual freight from the seller's shipping point to the buyer's delivery point was less than the rail freight from Pittsburgh to the buyer's delivery point, the seller collected the difference. Such excess amount collected by the seller is sometimes referred to as "phantom freight." When the actual freight from the seller's shipping point to the buyer's delivery point was greater than the rail freight would have been had the shipment been made from Pittsburgh, the seller 1814
absorbed the excess delivery charges.

Since the issuance of the original complaint herein, certain of the respondents have ceased using this method of pricing and selling. Respondent Taylor, since June, 1945, has sold welded chain f.o.b. its factory at Hammond, Indiana, equalizing freight with Pittsburgh. Since the early part of 1947 it has also equalized freight with Winona, Minnesota. Respondent Peerless began selling welded chain f.o.b. its factory at Winona, Minnesota in the early part of 1947. Another variation from the described method of pricing and selling has occurred in the case of sales of welded chain by respondents Seattle and Round California which are located on the West Coast. These two respondents have published the same base or list prices 1815
on welded chain as the eastern manufacturers. The cost to a buyer, however, was the base price plus an amount equal to the carload freight rate from Pittsburgh to the Pacific Coast and an amount to cover the cost of handling the chain, cutting it up into pieces as ordered and shipping it to various distribution points along the Pacific Coast. For example, this additional charge in 1947 was $1.70 per hundred pounds. This was computed by adding to the

carload freight rate from Pittsburgh ($1.47 per hundred pounds) a charge of 23 cents per hundred pounds to cover the cost of handling, cutting and distribution.

During the period covered by the amended complaint respondents American, Cleveland, Bridgeport, Round California, Seattle, Woodhouse, Columbus-McKinnon, Hodell, International, McKay, Nixdorff-Krein, Peerless, Taylor, and Western sold welded chain at prices calculated pursuant to and in accordance with the "Pittsburgh plus," or single basing point delivered price method or system described hereinabove.

1817 PARAGRAPH FOUR: Weldless chain has been generally quoted and sold on the basis of delivered prices computed by adding to a basic price f.o.b. the seller's plant an amount equal to the rail freight applicable to a particular shipment to the point of delivery from either York, Pennsylvania, Cleveland, Ohio, Cincinnati, Ohio, or Bridgeport, Connecticut, whichever point is located closest freightwise to the point of delivery, irrespective of the point from which shipment was actually made. Such method of computing delivered prices is sometimes referred to as the freight equalization delivered-price method or system. Under this method or system of pricing and selling the cost to a buyer was the seller's f.o.b. plant price plus freight from the nearest freight equalization point. In instances where the seller shipped weldless chain freight
1818 collect, the buyer paid the carrier the actual amount of the freight charges from the seller's shipping point to the buyer's delivery point. If the buyer's delivery point was nearer freightwise to one of the freight equalization points than to the seller's shipping point, the buyer was given credit on the invoice for the amount of the difference. The four equalization points named were not used indiscriminately as equalization points on all types of weldless chain, but were used only with respect to the prices of particular

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types of weldless chain as were manufactured at the particular equalization point in question. For example, the published discount sheets of respondent American show that on a majority of the weldless chain items freight was equalized with Cleveland, Ohio and Bridgeport, Connecticut. On a number of items freight was equalized with those two points and also with Cincinnati, Ohio, and on one item, furnace chain, freight was equalized not only with the three points named, but also with Holland, Michigan, where furnace chain is manufactured by the Holland Furnace Company (not a respondent in this proceeding).

The principal manufacturers of weldless chain are located in York, Pennsylvania, Cleveland, Ohio, Cincinnati, Ohio, and Bridgeport, Connecticut. Approximately 75 percent of the weldless chain sold in the United States is manufactured at these four places. The Cincinnati Pump Company (not a respondent in this proceeding) is located in Cincinnati, Ohio, which fact accounts for Cincinnati having been used as a freight equalization point on the types of chain manufactured by that company and by certain of the respondent manufacturers. Respondent Peerless began manufacturing weldless chain in 1941 and has a very small production capacity. It sells such weldless chain f.o.b. its factory in Minona, Minnesota. Respondent Western began to manufacture weldless chain in 1945 and since that time has sold such chain f.o.b. Chicago, where its plant is located, equalizing with other points of manufacture.

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Respondents Peerless and Western, prior to the dates they began to manufacture weldless chain, and the respondents Nixdorff-Krein, Taylor, Round California, Seattle, Columbus-McKinnon, and Woodhouse purchased their requirements of weldless chain from manufacturers on the basis of f.o.b. the closest manufacturing plant to their places of business. In pricing the weldless chain so purchased for resale, these respondents, except Columbus

McKinnon, used the same freight equalization points as did the respondents which manufactured and sold weldless chain. For example, respondent Western's purchases of weldless chain from manufacturers were on an f.o.b. Cleveland basis—Cleveland being the closest equalization point to Chicago. Thus, Western paid the manufacturer's f.o.b. plant price plus freight from Cleveland to Chicago regardless of where the shipment originated, less a "courtesy" discount. Western then resold such chain on an f.o.b. Cleveland basis (or f.o.b. one of the other equalization points if closer than Cleveland to the buyer's delivery point). Respondent Columbus McKinnon's price lists on weldless chain state that freight was equalized with various points. There is evidence in the record, however, that respondent Columbus McKinnon resold weldless chain, purchased by it, f.o.b. its plant at Tonawanda, New York, and on isolated occasions, f.o.b. Pittsburgh. Its sales of weldless chain amounted to less than one-half of one percent of its total chain sales.

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During the period covered by the amended complaint respondents American, Cleveland, Bridgeport, Rand California, Seattle, Woodhouse, Hodell, International, McKay, Nixdorff-Krein, Peerless, Russell, Taylor, Turner & Seymour and Western sold weldless chain at prices calculated pursuant to and in accordance with the freight equalization delivered-price method or system described hereinabove.

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PARAGRAPH FIVE: Tire chains have been generally quoted and sold on the basis of f.o.b. mill prices of so many dollars and cents per pair, with full freight allowed from the seller's place of shipment to the buyer's delivery point. Such method of computing delivered prices is sometimes referred to as the zone delivered-price method or system. On shipments where the buyer paid the carrier for the freight charges, allowances were generally made on the

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invoices for the amount of freight paid. The freight allowance was applicable only on certain minimum shipping quantity, which has generally been the same for the majority of the respondents selling tire chains.

During the period covered by the amended complaint respondents American, Cleveland, Bridgeport, Round California, Seattle, Woodhouse, Columbus McKinnon, Hodell, International McKay, Nixdorff-Krein, Peerless, Pyrene, St. Pierre, Taylor, and Western sold tire chains at prices calculated pursuant to and in accordance with the zone delivered-price method or system described hereinabove.

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PARAGRAPH SIX: The respondent Institute was organized in June, 1933, by respondents American, McKay, Pyrene, St. Pierre, Taylor, Cleveland, Columbus McKinnon, International, Nixdorff-Krein, and Woodhouse. The respondents have operated and now operate the Institute to promote and serve their mutual interest. Among the activities carried on by the respondents through the respondent Institute were the exchange of general information on market conditions, exchange of information on labor conditions, cooperative advertising, attempting to secure a tariff on chain products to meet foreign competition, carrying on of a statistical program, and other activities, as described hereinbelow.

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(a) The minutes of formal meetings of the Institute do not show that present and future prices on chain and chain products were discussed at such meetings. Such minutes do show, however, that the respondent members formally adopted a program of checking on prices charged in past and closed transactions, and that costs on products of the industry were discussed. There is substantial evidence in the record that present and future prices on chain and chain products were discussed and agreed upon on the occasion of Institute meetings and that the Institute

was used as a means for promoting and maintaining adherence to the prices agreed upon.

The nature of some of the discussions had on the occasion of Institute meetings with respect to prices is indicated by the following excerpts from the testimony of respondent Bond.

> "A. Well, frankly, you know how you do at these meetings. You hear a lot of tripe and a lot of crap and red tape which they put through, and they put on a lot of rigamarole and put you on these committees doing a lot of different things. A lot of it, too, has been very constructive and I have been very active,
> 1829 and I spent a lot of time doing things I thought beneficial not only to my company but to the industry as a whole and of benefit ultimately for the good of the country as a whole.
>
> "But, after we get rid of a lot of this stuff, maybe while we are at lunch or adjourning for a drink or something, then we start talking. Maybe somebody will say to you, 'You so-and-so Son of a B., what did you do down at Bill Jones'?' And you will say, 'What did I do?' Well, he'd say, 'You give them some extras.' And then somebody calls somebody a liar and so forth, and then maybe he would say, 'Well, I have got the evidence that you did, and you are a liar,' and then you would get into a fight with this fellow, and first
> 1830 thing you know, somebody else would come up and listen to the conversation, and then there would be six of them there, and they would be picking on you I don't mean picking on me, but picking on these price cutters, you understand.
>
> "So, well, maybe by that time they had had three or four drinks and the thing begins to get a little tougher, and the drinks loosen up some tongues—

of course, I don't think, you understand now, gentlemen, therefore I was always in perfect control of my vocal chords, and I have a marvelous vocabulary, I can assure you, when it comes to calling names, and it has been tested by every member of the Institute, and when I call a guy a dirty, low kind of a so-and-so price cutter, he knows he has been called a price cutter (Laughter).

"I will be frank, and if you want to crucify me, I will add this: I would tell him further that if he didn't stop these damn price cuttings, I would show him how to cut prices, and many times I did cut them, and when I cut a price, and if it was your price I 1832
was cutting, take it from me, brother, you knew your price had been cut.

"I could go on and on and on—but I want to say that when any two businessmen get together, whether it is a Chain Institute meeting or a Bible class meeting, if they happen to belong to the same industry, just as soon as the prayers have been said, they start talking about the conditions in the industry, and it is bound definitely to gravitate, that talk, to the price structure in the industry. What else is there to talk about? And a guy like me that doesn't drink or get high and go to the bar—why, of course I had to defend myself in some other fashion than getting drunk and forgetting it—is there anything else you want me to 1833
tell you now?

"Q. Is that the general sum and substance of these conversations that would be had? A. Well, the ones off the record would be largely that, unless there were periods when there wasn't any particular price cutting, then they would go out and play golf and

be gentlemen and have a good time; go up to Hershey, Pennsylvania, for instance, where they had ball games, and that kind of stuff" (R. 1096-8).

The activities of the respondents through the Institute and on the occasion of Institute meetings with respect to prices are indicated by numerous exhibits in the record. Excerpts from some of such exhibits are set out below.

On August 20, 1937, George J. Campbell, Sr., now deceased, formerly president of International, wrote Mr. Reinicker of the John K. Wilson Company, a customer of International, stating in part:

1835 "These [There] has been so much cutting of all types of chain and tire chains, etc. that the writer has about made up his mind to withdraw from any price situation whatever with anyone and go my own way. This means, of course, a general dropping of everything to practically cost and maybe we can secure something here and there and be just as well off. In other words, every year on the tire chain, the McKay Company, Cleveland, or one of these other fellows go after my customers and we have to meet the price at a very low discount and then we are held off from quoting the nice jobbing business that McKay, American, and the other fellows get at the high prices, so I have warned them for three years now if it happens

1836 this year I would withdraw from any price situation whatever and go right after the business of all the jobbers at any price that I see fit to make. We have made up our minds on this and have already sent word to some of our salesmen as to just how far they can go and that matter I will also take up with you for the few customers that Jack has sold, so as to put them in the right light." (Comm. Ex. 320.)

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On November 22, 1937, George J. Campbell, Sr., wrote Mr. Reinicker, in part:

> "Just returned from the meeting in New York and nothing was mentioned about trace chains and tire chain took up most of the time.
>
> * * * * * *
>
> "The few minutes left to talk things over was the matter of Pound Chain prices. It was acknowledged by those in attendance that the price of Pound Chain for the last month or so anyway has been on a basis of 33⅓-10%, f.o.b. Pittsburgh.
>
> "The understanding left was that we should drift along for another month and not to make any public price of 33⅓-10% but everybody I think left the room with a note in the back of their head that hereafter the price of pound chain is 33⅓-10%. You can notify your men to accept any Pound Chain business offered to them on the basis of 33⅓-10%, f.o.b. Pittsburgh, from the present list." (Comm. Ex. 323.)

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The minutes of a meeting of the Institute held in New York on November 18-19, 1937, presumably the meeting referred to in the above excerpt, contain no reference to the discussion had as to prices on pound chain. Such minutes do show, however, that the members present unanimously adopted a program of checking on past and closed transactions. Respondents American, Cleveland (and associated companies), Columbus McKinnon, Hodell, International, McKay, Nixdorff-Krein, St. Pierre, Taylor, Western, and Woodhouse were represented at that particular meeting.

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On March 11, 1938, George J. Campbell, Sr., wrote Mr. Reinicker concerning a meeting of the Institute held in Pittsburgh on March 8, 1938, stating in part:

"We had a very interesting and serious meeting again in Pittsburgh. A new sheet will be out on Trace Chains any day, and I believe it will be on a basis of $64.00 for 7-8-2 traces, less 20%, with confidential 10%, f.o.b. Pittsburgh, Pa.

"Pound Chain—same as heretofore—33⅓%, with confidential 10%." (Comm. Ex. 353.)

On April 4, 1938, George J. Campbell, Sr., wrote John K. Wilson, of the John K. Wilson Company, concerning a meeting of the Institute held in Washington, D. C., on April 1, 1938, stating in part:

1841 "Nothing was changed at the meeting. The price on trace chains you have, and the price on pound chain is supposed to be 33⅓% and the 10% confidential." (Comm. Ex. 352.)

On April 18, 1938, W. C. Perkins, manager of the Pittsburgh sales office of respondent American, wrote A. P. Van Schaick, now deceased, formerly general sales manager of American, in part:

"Now as to the matter of price on traces, the old list price of $57.50 less 20-10% seemed to be prevalent, so that no competitor evidently attached much importance to the statement you made at the Institute meeting here in Pittsburgh as to what we would do
1842 if the 64¢ list price and the agreed discount were not maintained. • • •

"You will recall my unfavorable reaction to the program that was set up here March 9th, and I predicted it would be shot all to pieces and no effort to maintain it within thirty days. It did not take that long, and I am convinced some of our competitors

were anxious to have the agreed program announced simply to give them a little more margin to chisel on." (Comm. Ex. 84-B.)

On November 14, 1938, respondent Kirkpatrick, vice-president of American, wrote W. C. Perkins, manager of the Pittsburgh sales office of American, in part:

"I am not sure I told you that on Thursday and Friday of this week we will have a Chain Institute meeting. Of course, you know how we have been fighting for price stabilization and perhaps you will run into some irregularities where you will see positive evidence of price weakening. If you have any 1844
definite information, will you kindly get it to me prior to this meeting. * * *" (Comm. Ex. 91.)

On December 22, 1938, George J. Campbell, Sr., wrote John K. Wilson, in part:

"Have just returned from the Chicago meeting and sorry to state that thru the stubbornness of American Chain Company, the prices of chain still stands 'status-quo,' the same as what you have sent out in your letters. They are still crying about that letter you sent out, stating that they lost thousands of dollars by meeting those prices, especially the $2.75 on the Inco chain.

* * * * * *

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"We also were advised at the meeting that the reason American Chain Company, and in fact a couple of the others, did not want to advance the prices at the present time [was] because they thought the market should be better stabilized, as they heard that there was an extra 5% out in several places." (Comm. Ex. 340.)

On August 7, 1939, W. C. Perkins sent a telegram to J. B. Taylor, representative of respondent American in Dallas, Texas, stating in part:

> "COMPLAINT HAS BEEN MADE TO HEADQUARTERS BY OTHER CHAIN MANUFACTURERS THAT YOU ARE BROADCASTING DISCOUNT OF THIRTY THREE AND THIRD AND THREE TENS ON POUND CHAIN WHICH THEY CLAIM IS UPSETTING THE MARKET AND BRINGING COMPLAINTS FROM THEIR CUSTOMERS TO WHOM THEY HAVE NOT GIVEN THIS DISCOUNT." (Comm. Ex. 71.)

L. D. Cull, an official of respondents Cleveland, Bridge-
1847 port, Seattle, Round California, and Woodhouse, wrote W. D. Kirkpatrick on December 6, 1939, in part:

> "I quite agree with you that there is a big possibility that we will drift very rapidly into what George Campbell has predicted. In fact I have reason to know that the present jobber set-up on tire chains is likely to be undermined considerably by those on the outside if we who are members of the Institute invite the spread of the 'smallpox' which has invaded the so-called gyp trade, by using unbranded chains at comparable prices. Our company has lost a lot of gyp business by not meeting the situation in that field and therefore realize how it feels to have chunks of business get away, but are willing to go a long way in a constructive program to
1848 both prevent the spread of the disease and also cure it, where it now exists.
>
> "You recall the saying, 'the poor we will always have with us'—in the same way there will always be the price cutter. But if we can steer the program right I am sure by ignoring the very small portion of the business thus taken, we will find a handsome return on the rest of it when we balance our books at the end of the year.

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"Of course some of us can go along for many, many years even on the basis of the past year, but what's the use of using skimmed milk when we might be having cream? Personally, I think Don's enthusiasm could be used to mighty good advantage. What do you say, Kirk?" (Comm. Ex. 178.)

On July 15, 1940, George J. Campbell, Sr., wrote Hamilton Hart, Knoxville, Tennessee, in part:

"Might state, Ham, that the writer attended a meeting a certain meeting, this past week and I feel sure there will be no further drop in the price of chain but would not be surprised if there was an advance shortly on some of the lines." (Comm. Ex. 330.)

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Also, on July 15, 1940, George J. Campbell, Sr., wrote John K. Wilson, in part:

"Jack, very, very confidentially and, for heaven's sakes, do not give it out, there is probably going to be a raise in the price of pound chain and other lines of chain now very, very shortly. It will not be a great raise in the price from the regular printed discount but, it will be a tremendous increase from the 10-16-10% on pound chain that we are now giving out and I think, Jack, that you will find when these new prices are given out, they are going to be held just as firmly as the trace chain prices and also I think the Hodell people are about through with any cut prices on any line of chain." (Comm. Ex. 332.)

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The respondents contend that the letters in evidence written by George J. Campbell, Sr., from which a number of the above excerpts are taken, are not entitled to evidentiary value since the writer of the letters died before this proceeding began; since there is credible evidence in

the record by which the writer is shown to have been prone to exaggeration and misstatements; and since any inferences of price fixing which might be drawn from such letters were categorically refuted by the uncontradicted testimony of respondents' witnesses that there has never been any price fixing in the chain industry. The Commission rejects these contentions. The letters are entitled to, and were given, evidentiary value in connection with the finding that the respondents discussed and agreed upon prices on the occasion of Institute meetings. The discussions, understandings and agreements indicated by such letters are, for the most part, corroborated by other evi-
1853 dence in the record. For example, two of the above excerpts are from letters written by George J. Campbell, Sr., on July 15, 1940. The quoted excerpts clearly support an inference that an agreement had been reached at a meeting of the Institute to increase the price of pound chain and other lines of chain shortly. Additional facts which were considered in this connection are that a meeting of the Institute was held in Cleveland, Ohio, on July 10-11, 1940, at which Mr. Campbell represented respondent International. Respondents American, Cleveland (and associated companies), Columbus McKinnon, McKay, Nixdorff-Krein, Peerless, Pyrene, Taylor, and Western were also represented at such meeting. Respondent American announced an increase in price on certain items of welded chain as of July 22, 1940. Increases identical with those
1854 announced by American were reflected in the price list of Columbus McKinnon, dated July 22, 1940, of Cleveland, Bridgeport, Seattle, Round California and Nixdorff-Krein dated July 23, 1940, of International, Western and Woodhouse dated July 25, 1940, of McKay dated July 26, 1940, and of Hodell and Taylor dated July 29, 1940.

(b) Respondent Merriman was employed as managing director of the Chain Institute on or about August 1, 1938,

and has served in that capacity since that date. Prior to the employment of respondent Merriman, and especially during the years of 1932, 1933, 1936, and 1938, which were years of business depression in the Chain Industry, the respondent manufacturers were not adhering to their announced or published prices in connection with many sales. The respondents desired that prices be stabilized, and among the duties which Merriman was expected to perform, and did perform, was that of exhorting the respondent manufacturers not to sell their products at less than their published prices. A committee of the Institute, composed of W. D. Kirkpatrick, vice-president of American, George J. Campbell, Sr., president of International, and D. S. Brisbin, vice-president of Columbus McKinnon, contacted Merriman with a view to retaining him to serve the Institute. On July 1, 1938, George J. Campbell, Sr., wrote H. G. Reinicker, of John K. Wilson Company, in part:

> "This is unusually confidential, and wish you would keep it to yourselves, that we are figuring around on a new man to run the industry, something like a Judge Landis, or a moving picture boss, or something like that, that can hold the 'brothers' more in line than they have been in the past; and we have left the matter to a committee, of which I am one of the members, to decide between two very good men; so that I think that things are moving in the right direction for the stabilization of prices in the industry. They are all pretty well sick of the present situation, with no business and low prices." (Comm. Ex. 357.)

Again, on July 11, 1938, George J. Campbell, Sr., wrote H. G. Reinicker, in part:

> "• • • Confidentially, Harry, I am going out with a committee of two other men from the larger manu-

facturers, and one of which is—in fact, it is American Chain and Columbus-McKinnon—Mr. Kirkpatrick and Mr. Brisbin—to get in touch with Dennis Merryman [sic], who was let out of the American Steel & Wire Company a short while ago, to see if we can get him, or persuade him, to act as the 'Judge Landis' of the Chain Industry.

"I hesitate to do anything now, after having been placed on this committee, and am going out to Chicago to see this fellow, until I have a talk with him to see if we can persuade him to take the job; and also, if we can persuade him to act a little sharp on any such
1859 practices as is now going on in the industry. This means, of course, if it goes through, that I will have to live up to the regular prices, but I think we can afford to do that now, rather than have all these tens and fives and make no profit after we get the business. * * *" (Comm. Ex. 349.)

At a meeting of the Institute held on July 28-29, 1938, at which respondents American, Cleveland (and associated companies), Columbus McKinnon, Hodell, International McKay, Nixdorff-Krein, Pyrene, St. Pierre, Turner & Seymour, and Western were represented, the above-named committee was authorized to conclude arrangements with Merriman for his employment at a starting salary of
1860 $6,000 per year, effective August 1, 1938. Prior to his employment by the Institute, Merriman had been vice-president and general manager of a large steel fabricating company, from which position he had been retired, and in which position he had frequent contact with jobbers in the same field as the chain manufacturers sell. Merriman had strong personal views concerning adherence by sellers to their published prices, which views were known to the members of the Institute prior to his employment. In an

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address to the members of the Institute prior to his employment, he said among other things:

> "We know that agreements on prices are contrary to law. Personally, I never did believe in price agreements because there are at least half-a-dozen ways in which any agreement can be broken—and, in the final analysis, the question is one of—
>
> Good faith among the various concerns engaged in the Industry:
>
> Good faith on the part of the individual members of the firms:
>
> Recognition of the Principle—'Live and Let Live':

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> Acknowledgment of the fact that price competition is just like water, which will always seek its own level—either up or down.
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> "There is a foolish notion existing in some quarters (and among those who are, in their own estimation, past-masters on how to conduct any and every form of business), but the fact is these people just don't know the first thing about merchandising. Rarely will any first class Manufacturer deliberately cut a price on his product of equal quality with those of competitors. It has been done, but it is the exception rather than the rule." (Comm. Ex. 225-I.)

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There is testimony in the record to the effect that respondent Merriman had no function, control, or authority in connection with the prices of chain and chain products. Nevertheless, inquiries and complaints as to price cutting made to Merriman by members of the Institute were investigated by him, at least to the extent of asking the member accused of having sold at less than the published price whether that was true and then reporting whatever reply he received to the member making the inquiring or

registering the complaint. For example, on August 4, 1939, J. E. Seitz of respondent American wrote W. C. Perkins, manager of the Pittsburgh sales office of respondent American, as follows:

> "Merriman has called my attention to the fact that Jack Taylor is broadcasting a discount of 33⅓-10-10-10% in Oklahoma and Texas. He is not confining this to our loyal customers but apparently is quoting it to everyone 'irregardless.' This means that people who have not been loyal to us during the past are reporting it back to their present source of supply.

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> Merriman suggested that I call your attention to this as they are looking for leadership rather than to break the market. He has a report that Tru-Test will meet this price if it is continued to be quoted, and Biddle are also reporting on it, so it will probably be done very shortly and then we are going to be blamed for putting this discount in effect generally." (Comm. Ex. 72.)

Mr. Perkins answered the above letter on August 7, 1939, as follows:

> "I have your letter of the 4th inst. regarding reputed activity of Jack Taylor in quoting price on Pound Chain.

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> I get very much fed up on the 'holier than thou' attitude of some of our competitors who have been quoting 33⅓-10-10-10% all along on Pound Chain and have not hesitated to give this price to our customers who never buy anything from them.
>
> The complaints to D.A.M. look to me like a smoke screen to hide some culprit's irregularities. I am just as anxious as anyone to see this price stabilized, and we have not now, as has heretofore been

the case, made this price until after we found others were quoting it.

I have telegraphed Jack as per attached copy of wire, and will pass his reply and explanation to you as soon as received. I am quoting telegraph reply of even date from Jack Taylor as follows:

'Retail price pound chain working under impression this price general however will be governed per wire have not quoted other than regular accounts except few cases larger accounts who already had price stop some have five percent beyond from competition please advise position regards regular oil field supply houses'". (Comm. Ex. 70.) 1868

On August 8, 1939, J. E. Seitz wrote Merriman as follows:

"After our conversation last week concerning operation in Oklahoma and Texas I contacted Perkins and he in turn got in touch with Jack Taylor. We have his statement that he was advised in numerous places of the discount of 33⅓-10-10-10% having been quoted before he even thought of quoting same, or was authorized to meet this price.

Naturally after these reports were passed along he was given authority to meet the price and, to our good customers, authorized to quote this discount. In fact, we have heard of a discount of 5% beyond the discount referred to above. It has been quite evident from reports we have had that others have not refrained from quoting our friends this discount of 33⅓-10-10-10%, even to people who have not been buying at all from them. As you know we have adhered to our published price more religiously than anyone else but we cannot sit idly by and lose all of our customers. 1869

instructions have been issued that this special discount is not to be quoted promiscuously." (Comm. Ex. 69.)

On June 29, 1939, Merriman wrote George J. Campbell, Sr., president of respondent International, as follows:

"Your letter of the 28th concerning the price Hodell is making on tie out chains. I have not had this information from any other source, but I am not questioning the correctness of your report. Neither do I know anything about an extra 10% on pound chain. It is my belief that the pound chain market is being
1871 pretty well maintained. I have said many times over that to expect one hundred per cent perfect situations would be foolish. Anybody who want to quote any price they please on pound chain, or any other chain has that privilege, for there is no obligation to do otherwise, except that all manufacturers have an obligation not to discriminate between customers in the same competitive fields.

Your letter indicates that you are meeting Hodell's prices wherever they are reported, and whatever they might be, and if that is going to be your policy it seems to me somebody else will feel disposed to meet your prices, and some fourth manufacturer will be disposed to meet the prices of the third, and there you have the
1872 vicious circle, or endless chain, and you have no market at all.

The result of this is that Hodell, with a very small percentage of the total chain business, is making the market for more than 95% of the industry. Some time ago President Roosevelt described some of the parties in the cutting prices activities as chiselers, and it is generally recognized that a reputable concern

having a published price should maintain that price unless circumstances force them in a hurry to modify it.

Hodell has the privilege of making any price he pleases. He is nominally a member of the Institute, but in my opinion is not actually one. Every other manufacturer in the Institute has the same privilege you have of making any price you please, but I ask you again to count the cost. You will share in the losses in direct proportion to the percentage of the business you secure, and it is not a question of one year, but probably ten years before profits might be secured. 1874

With business acknowledged to be around fifty per cent of normal, great care must be taken on the part of every manufacturer unless he proposes to turn things upside down. Every manufacturer is entitled to a legitimate profit so as to pay fair salaries and wages, and if possible, certain taxes for the maintenance of the government. This can't be done by selling goods below cost.

If Hodell was to take enough business to run full for the balance of this year, the tonnage involved would not hurt anyone. There are others producing chain outside of the Institute we never hear about, and nobody seems to care, so why concentrate on everything Hodell does. 1875

This is just a heart to heart personal talk in the hope that you will consider this subject thoroughly and from the standpoint of the most good for all, and if you do, that means is going to do the most good for you also.

In all my experience I have seen so many situations somewhat similar to this and when reason did

not prevail, the result was chaos and ruin for some. Nobody wants to see that happen.

You refer to prices on trace chains. I do not know what Hodell is quoting on trace chains, but there is a report that your chains are being offered—since May 23—at 20-10-5% and can now be secured on that basis. If that is so, you have no complaint against anyone, and in view of all I heard about the disastrous price on trace chains and the loss at which they are selling, I am at a loss to understand why these prices should rule.

1877 There is no use in trying to attach the blame to any one manufacturer. In my opinion all share in the responsibility. Again I say, it is your mill, your product, your money invested, and you can make any price you please but once again—count the loss, not for today, but for the next ten years." (Comm. Ex. 182.)

On September 24, 1940, respondent Bond, vice-president of McKay, wrote W. H. Reid, a salesman of McKay, as follows:

"Merriman contacted Carroll, who states they haven't sold Georgia Supply in the last year, and if Gantz makes this statement, I would believe him. We are checking further.

1878 Campbell, of International, advises the last sale of Trace Chains to Kaminski was on June 20, 1939. Since then—no correspondence, no quotations, and no business dealings in any way." (Comm. Ex. 411.)

On February 19, 1941, respondent Bond wrote W. H. Reid as follows:

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"I have your various reports and have passed the information on to our friend Merriman, as per copy herewith, and am also giving copy of this to Fred Smith.

All we can do is do our damnest—meet the situations when, as and if we get the chance, but still adhere to our policy of not indiscriminately breaking down the price structure as the whole thing doesn't make sense." (Comm. Ex. 404.)

Merriman also made speeches at Institute meetings in the course of which he expounded his personal philosophy with respect to selling in accordance with published prices. 1880
For instance, at a meeting of the Institute held on January 10-11, 1940, Merriman said, in part:

"Based on my own experience, I consider it a sign of weakness for any sales manager to feel obliged to sell his product below the price of a competitor for similar quality and service. Competition is like water; it seeks its own level, up or down, and while there always will be variations in prices owing to different conditions existing, there is no reasonable excuse why any first class concern should have a published list of prices and then deliberately shade them.

* * * * * *

If the members of this Institute will exercise good common sense and think twice as to what the reaction 1881
may be on the entire market before cutting prices at any time on any product, then the results at the end of 1940 will be satisfactory from the standpoint of profits, and other problems we have to consider will, we feel sure, be taken care of in a pleasant and agreeable manner." (Comm. Ex. 212-E, H.)

By impressing upon the members of the Institute his views to the effect that each member should adhere strictly to its published prices, and in aiding the members in detecting those members who did not so adhere, respondent Merriman contributed materially to the plan of all the respondents to prevent departures from the prices established pursuant to the pricing systems described hereinbefore.

( ) The respondents' activities to prevent sales at prices less than those in published list prices and published discounts therefrom were not confined, however, to the above-described activities. The more direct method of one re-
1883 spondent manufacturer inquiring of another as to whether, or why, a particular sale or offer to sell had been made to a particular customer at less than the published price was resorted to in numerous instances.

For example, on July 15, 1937, George J. Campbell, Sr., wrote H. G. Reinicker, one of International's customers, in part:

> "Just hung up the 'phone from talking with Van Schaick of Bridgeport.
>
> "Van is very angry with me, altho he talked nicely, and stated he didn't know what in the devil I was doing about trace chains, especially in stealing his customer. He stated he had the Monroe Hardware
> 1884 Company order for the last three weeks at regular prices, and now he states we have taken the business away from him, and they feel a little peeved about it, and suggested that probably the result would be, if it kept on, that all prices would reach the level that we made.
>
> "Would suggest that your men keep away as much as possible from any of the American Chain Company's

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customers, because they are the ones that, of course, 'pull the whole temple down,' while the others, like McKay, will just have to 'bite their tongue' and stand for it." (Comm. Ex. 364.)

Again, on August 4, 1937, Mr. Campbell wrote the same customer, in part:

"Was just talking to the boys, and I just had a call from one of the other manufacturers in the Southwest, and he asked me if we had made an additional 5% off the old price list. I told him of a couple [of] instances, because I knew he knew something or he wouldn't have asked me.

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Inasmuch as we are now all endeavoring to get the prices up, and also inasmuch as I think you will agree with me, we have sold about as many of the trace chain customers, which includes pound chain, as it is possible to sell this year, hadn't we better now start to quote the pound chain from the new list, even tho we allow a 5% on that; but try to get the old list outlawed if we possibly can, before the American Chain or someone else comes out with their list the same as the one before this one." (Comm. Ex. 369.)

On September 11, 1937, Mr. Campbell wrote Mr. Reinicker, in part:

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"We received the following information from Mr. Edgar Littman of the Nixdorff-Krein Company, that on August 12th their representative called on Montgomery & Crawford, and they offered him traces at an extra 10%, which their representative declined. The buyer laughingly then admitted that he had no such prices but that he had already placed his order with his regular source of supply, and had written

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them he had an offer on Traces of an extra 5%, and was now awaiting a reply from the regular source as to whether they would meet." (Comm. Ex. 373.)

With respect to a complaint that American had quoted a particular price on tie-out chains, Mr. Campbell, on November 11, 1937, in a letter to H. G. Reinicker, stated, in part:

"Believe it is best to check up some times when the questions of prices get so ridicuous. The writer called up the American Chain Company today regarding the situation on tie-out chains. As you know it has only

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been a short time ago that tie-out chain prices were fixed on the SRP finish at 60-10-5% and on the bright 60-10-10%.

We have had so much trouble with this fellow Rawlings of Watters & Martin that I thought it best to put the cards on the table and find out what we could find. I told Mr. Kirkpatrick that we understood American Chain was now quoting 70-10-10-5% promiscuously around the Country on Tie-Out Chains SRP finish.

Mr. Kirk went over the situation very carefully and when I told him the name of Watters and Martin, he looked it up and found the follows: They, the American Chain Company, received an order from

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Watters & Martin for 42 doz. tie out chains, SRP finish on November 3rd with a price on the order of 70-10-10-5% and to be delivered or shipped on December 25th.

The American Chain Company advised the immediately returned the order and told them the price was 60-10-5%. This corresponds with the information you gave us and the letter that was sent to Mr. Hunter

by Mr. Rawlings was dated November 5th. Undoubtedly they thought that with the general recession of business that the American Chain or anyone would give them at least an extra 5% beyond the prices they had been able to get in the past." (Comm. Ex. 325-A.)

On April 20, 1939, Owen Sandstrom, vice-president of respondent Taylor, wrote W. D. Kirkpatrick of respondent American complaining about a price at which American had sold a particular customer, stating in part:

"The thing that is hard for the writer to understand is that Howell claims that they do not entertain quotations from other manufacturers except American and 1892
Taylor, so why should you find it necessary to quote such ridiculous prices even though they might be going elsewhere." (Comm. Ex. 27.)

After investigating the transaction complained of, Kirkpatrick, on May 5, 1939, wrote Sandstrom, in part:

"Your complaint has been investigated and I am attaching a letter from Trevethan giving you his exact comments on your letter.

Certainly, Owen, it is not our intention to interfere in any way with the operations of your good company. Both you and Win have been more than fair in handling our mutual problems, and it is our intention to cooperate with the S. G. Taylor Chain Company wherever 1893
possible. In fact, at one of the recent Institute meetings I intimated to you a possibility of further cooperation in the tire chain field, and you know I would not have done that if I did not think quite a bit of your company." (Comm. Ex. 24.)

On November 6, 1941, the president of respondent Taylor wrote respondent American, in part:

"We have information from our representative in the Southwest that an order for $7,000.00 worth of tire chains was procured by the Monroe Hardware Company for the Arkansas Bomb Proving Ground at Hope, Arkansas. I do not know whether these were Bar Reinforced Tire Chains or Regular Twist Link Chains, but from the information which we have it would seem that this should have come under the Procurement Contract and should not have gone through a jobber." (Comm. Ex. 30.)

In answering the above, J. J. Thiebauth of respondent
1895 American, said in part:

"Replying to your letter of November 6th, the Monroe Hardware Co. are not tire chain distributors of ours, and the last Southwest inquiry, as I understand it, was awarded to Goodrich on Western Chain, at something like $4714.10 on a 60-hour delivery.

"We have had no order from the Southwest for anything like $7000.00 worth of chains for any Government division." (Comm. Ex. 29.)

(d) Among the objects or purposes of the Institute set forth in its Certificate of Incorporation were those to standardize and simplify the products of the industry. The minutes of meetings of the Institute show almost
1896 continuous activity in connection with standardization and simplification through committees composed of officers of the respondent manufacturers and otherwise.

The minutes of a meeting of the Institute held on January 20 and 21, 1936, which was attended by representatives of respondents American, Hodell, Cleveland, Columbus McKinnon, International, McKay, Nixdorff-Krein, Pyrene,

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Taylor, Western, and Woodhouse, contain the following statement:

> "The membership discussed the standard tire chain specifications adopted by the Institute in 1935. It was unanimous judgment of those present that these specifications adequately cover requirements. The Specifications Committee was instructed to prepare a letter to accompany standard specifications for distribution to Federal Government Departments and States for the 1936-1937 season." (Comm. Ex. 250-B.)

The minutes of a meeting of the Institute held on March 2 and 3, 1936, which was attended by representatives of all the respondent manufacturers except Russell and Turner & Seymour, show the following:

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> "The Specifications Committee at this point was instructed to prepare and submit to the meeting before adjournment their recommendations on a specification for Sub-Standard Tire Chains, and it was agreed that if the Specifications Committee submitted a suitable specification that it be adopted as a standard of the Industry.
>
> "The Specifications Committee later submitted their basic recommendation on the fundamental standards of a Sub-Standard Chain and upon motion duly made and adopted, it was agreed that the following be adopted as standard on this item by the Industry, complete details to be later submitted by the Specifications Committee to and to be in turn re-distributed to the members by Mr. Paull:—

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* * * * * *

> "Upon motion duly made, seconded and adopted, it was agreed that the following specifications for

Cross Chains on Emergency Unit Chains be adopted as standard for the industry:—

* * * * * *

"Upon motion duly made, seconded and unanimously agreed upon, it was decided that the 6.00-16 Light Car Special assembled complete Tire Chain would be retained in the line for the coming season, but the 6.00 Light Car Special Cross Chain would be eliminated.

"At this point, after a re-discussion of the Sub-Standard Chain, it was unanimously agreed that only the eight (8) groups provided in the standard specifica-
1901 tions would be made." (Comm. Ex. 255-B, C.)

The minutes of a meeting of the Institute held on January 23 and 24, 1939, at which all the respondent manufacturers except Hodell, Russell, and Turner & Seymour were represented, contain the following statements:

"There followed a lengthy discussion relative to specifications of weldless chain. The Secretary, it developed, had overlooked informing Mr. Campbell relative to the specifications for 2/0 Tenso pattern chain and he was instructed to be certain to do this.

"The subject of specifications for 'substandard' tire chains was then discussed and all present indicated
1902 their understanding of these specifications, broadly stated, to be as follows:—

The same as standard specifications, with the following exceptions:

1. Wire is one gauge lighter than is used in standard specification chain for same tire size.

2. The hooks are longer than used in standard specification chains.

3. Cross chains are spaced every fourth link.

4. Side chain is lock link pattern." (Comm. Ex. 221-B-1.)

The minutes of a meeting of the Institute held on August 26 and 27, 1941, contain the statements:

"Mr. Bond as Chairman of the Specifications Committees made a report on the Welded Chain Specifications Committees recommendations pertaining to the suggestions made to the Committee by the Mackinac Island meeting on the simplification and standardization of various items, which were acted upon as 1904
follows:—

Elimination of second (HB) grade of Dredge Chain —Approved by the Members and the Secretary instructed to bring this matter to the attention of The Carroll Chain Company, Johnson Farmer Chain Company, Troy Chain Company and The Hodell Chain Company.

Elimination of 13_8" and 11_2" sizes of Proof, BB and BBB Coil Chain—Approved by the members.

Elimination of Fire Welded Steel Loading Chain—Approved by the members.

Elimination of Shouldered cold shuts—Since most of the manufacturers do not make cold shuts they 1905
recommended the matter be taken up with the manufacturers outside of the Industry.

Elimination of 1/0 Passing Link Chain—Approved by the members.

Elimination of all Heel Chains excepting Numbers 45, 57 and 61—Approved by the members.

1906 *Findings as to the Facts and Conclusion.*

Elimination of all except three sizes of Trace Chains 8-0, 8-1 and 8-2, all with 8 links per foot, available with Ring, Hook, T Hook or T Bar, in Bright or Electro-Galvanized finish. Approved by the members.

"One of the members recommended that consideration be given to eliminating the plating of second grade tire chains, which prompted another to suggest elimination of the second grade tire chain entirely from the line. Discussion developed the desirability of not acting on either point hastily and the members were therefore asked to give consideration to both questions in the interval before the next meeting and
1907 the Secretary instructed to write each manufacturer involved reminding him of the matter.

"Mr. Bond then reported that the Proposed Revision of Federal Specification RR-C-271 has been received and pointed out that as now written it provides for only one grade—double refined iron—Dredge Chain. After discussion it was agreed to accept this revision.

"It was also agreed to accept the Government's specifications on Grade 3 material for Buoy Chain, which now calls for a single refined iron.

"The Committee, Mr. Bond reported, is preparing comments and recommendations with respect to certain
1908 changes in test figures and minor items which they proposed to transmit through the Institute's office if agreeable to the members. This procedure was approved by the members and the hope expressed that the Weldless and Sash and Kindred Chain Specifications Committees would follow the same procedure promptly so the Institute's office could in a single communication make a complete statement of recommended changes." (Comm. Ex. 195-A, B.)

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The results of the above-described collective activities in connection with the standardization and simplification of products of the industry are attested to by the respondents' contentions that there is no difference between the welded chain, or weldless chain, or tire chain manufactured by one respondent manufacturer and that manufactured by another manufacturer; and that, therefore, a buyer will not pay more for the products of one respondent manufacturer than for the products of another. The president of respondent Russell in a letter to the Commission, dated December 2, 1942, commented on the activities of the Institute in part as follows:

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"The writer has always represented his Company in Chain Institute, and wishes to state that he is principally acquainted with only the manufacturers of the several types of chain such as our own. I can only speak most highly of my experiences in the Chain Institute because of the many constructive accomplishments. Up until 1933 the manufacturers of Sash, Safety and Jack Chains, were all trying to sell their product, size for size, under different numbers, different metal and wire thicknesses, links per foot, tensile strengths, and qualities of steel, brass and bronze varied widely, all of which was most disconcerting to the trade and most unhealthy for the chain business or industry." (Resp. Ex. 51-G.)

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(e) Another of the cooperative and collective actions engaged in by the respondents through the respondent Institute was the employment by the Institute in 1933 of Charles Donley, an independent traffic consultant in Pittsburgh, Pennsylvania, to compile a book of freight rates on welded chain from Pittsburgh to destinations throughout the United States and to revise such compilation from time to time. The compilation thus cooperatively

and collectively compiled and disseminated between and among respondent members selling welded chain was not intended to serve any need for freight rates for shipping purposes but was designed for use in computing delivered prices on welded chain and was so used by the respondent manufacturers who sold welded chain. The freight rates appearing in said freight rate book do not purport to be the actual freight rates from the points from which shipments of welded chain were made and do not reflect or purport to reflect the rates which would apply from Pittsburgh to the various destinations over all routes. Manufacturers of welded chain who were not members of the
1913 Institute were sent copies of the aforesaid freight rate books and revisions thereof. For approximately one year prior to March 1, 1943, the freight rate schedules prepared by Donley for the Institute were mailed by Donley directly to respondents American, Bridgeport, Cleveland, Columbus McKinnon, Hodell, International, McKay, Nixdorff-Krein, Peerless, Pyrene, Round California, Seattle, St. Pierre, Taylor, Western, Woodhouse, and the Institute.

The purpose of the freight rate books compiled and disseminated as aforesaid was to provide the sellers of welded chain with common delivery charge factors to be included in the price of welded chain delivered at various destinations. It was more important to this purpose that all sellers use the same factor than that they use the correct
1914 freight rate. That the respondent manufacturers considered it important that all sellers use the same delivery charge factor is indicated by the following excerpt from a letter from respondent, Bond, vice-president of McKay, to J. Emory Seitz, of American:

> "In your letter of the 20th, you state that your Traffic Department tells you that the carload rate to St. Paul and Duluth is 61½c, whereas Donley insists it is 63c to Duluth and 62c to St. Paul and Minneapolis.

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"I may be all wet, but I have just made the suggestion to Mr. Paull that he use Charles Donley as an impartial, technical freight advisor, as according to the records he is the Chain Institute's Traffic Counselor. In other words, let Donley advise Mr. Paull's office of any change affecting our freight schedule and any question of rates that might be referred to Mr. Paull by any manufacturer be first taken up with and checked by Donley before being bulletined by Mr. Paull. It seems to me, without doing this, that there is going to be more or less confusion if Mr. Paull's office accepts the comments and notices on freight changes that any of we manufacturers might send in." (Comm. Ex. 884-I.)

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(f) Respondent American has, for more than twenty-five years, been the most important factor in the Chain Industry in the United States. It manufacturers and sells all types of chain involved in this proceeding, and is the largest manufacturer of most of said types. It has been a leader in announcing quotations of prices on the types of chain and chain products described herein. Other respondent manufacturers have adopted and quoted as their own, prices identical with those announced by American, and have followed such quotations of American for substantial periods of time in connection with the sale of chain and chain products. Price lists and discount sheets and revisions thereof published by American were forwarded two or three days prior to the effective date shown thereon to American's jobber-customers and to each of the other respondent manufacturers. In letters transmitting its price sheets to the other respondent manufacturers, American requested the other manufacturers to send a copy of their price sheets. For example, on May 26, 1939, respondent American wrote respondent Peerless as follows:

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"We are attaching hereto a set of Jobber-Dealer, Dealer-Consumer, and Consumer price sheets and would appreciate it if you would, in return, send us a copy of your price sheets for our own files." (Comm. Ex. 35.)

On May 29, 1939, respondent Peerless addressed the following letter to respondent American:

"Received the price sheets enclosed with your letter of the 26th. It may be a week or so before we get ours out but we will send you a couple of the first copies off the press. We will, however, have our new Dis-
1919 count Sheet out in the next couple of days and as there is no material change in the prices of our old and new prices, we will put our new discounts into effect immediately and use our old price lists until our new ones are out.

* * * * * *

PS Kirk, will you please send us a copy of your discount sheet, channels of distribution, etc. Will appreciate this." (Comm. Ex. 37.)

As soon as practical after receiving price lists from American, the other respondent manufacturers changed their prices to conform to those announced by American and sent copies thereof to American, and in many instances to other respondent manufacturers.

1920

The prices appearing in the price lists published and disseminated by American as aforesaid were the result of understandings and agreements between the respondents, as hereinabove found. For example, on January 30, 1937, George J. Campbell, Sr., wrote Mr. Reinicker, of John K. Wilson Company, in part:

"Just returned from Chicago, after the meeting in Cleveland and I see that you have already advised

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the Office here that you received my notice of the price advance to go into effect immediately of 45¢ per cwt.

* * * * * *

"I cannot give you the exact raise in the prices of weldless chain as yet, because I left the meeting a little early and just as soon as we get word from the American Chain Company of these price lists, we will send you a copy and tell you all about it, in the meantime, get all the business you can for us at the old prices." (Comm. Ex. 360.)

1922

A meeting of the Institute was held in Cleveland on January 25, 1937, the minutes of which show that Mr. Campbell was in attendance. Respondent American issued a discount sheet on weldless wire and flat metal chains effective February 15, 1937, reflecting lower discounts and therefore higher net prices than those theretofore in effect. Most, if not all, the other respondent manufacturers manufacturing weldless chain issued similar discount sheets within a short time thereafter.

PARAGRAPH SEVEN: All of the respondent manufacturers, except respondents Russell and Turner & Seymour, stipulated that published list prices, published discounts therefrom and published list extras thereon have been generally uniform at any one particular time for all types of chain involved in this proceeding. Russell and Turner & Seymour entered into a similar stipulation insofar as published list prices were concerned, and a comparison of the published discounts of these two respondents with those of other respondents selling the same products shows that the published discounts were uniform for substantial periods of time.

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Through the use of generally uniform list prices, discounts therefrom and extras thereon, through the use of

identical pricing systems or methods for the different types of chain, supplemented in the case of welded chain by the use of common delivery charge factors to aid in eliminating price differences which might arise from the individual calculation of freight rates, through efforts to prevent departures from prices established pursuant to the different pricing systems, and through the use of the various other acts and practices described herein, the respondents have been able to achieve a relatively high degree of price identity in quoting and selling the different types of chain.

1925 The record contains a number of invoices covering the sales of all three types of chain during the month of October 1941. It was stipulated with respect to such invoices that they demonstrate the manner, form, and substance of the practices of respondents (except Russell and Turner & Seymour) in making sales of the three different types of chain. The methods of selling used by respondents Russell and Turner & Seymour are not materially different from those used by the other respondents selling the same products. It was further stipulated by all the respondent manufacturers, except Columbus McKinnon:

> "That counsel supporting the complaint contend that in an average of 95% of respondents' total sales of each of the three types of chain and chain products
> 1926 (i.e., welded, weldless and tire) during the period covered by the complaint, respondents followed the pricing and selling practices hereinbefore set forth, whereas respondents, while conceding that said practices were followed, contend that they were followed in an average of only 80% of such total sales.
>
> "That the difference between the contentions of counsel supporting the complaint and the respondents

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herein with respect to said percentage figures of 95% and 80%, respectively, arises from the fact that approximately 20% of respondents' total sales, as evidenced by the invoices studied, were at prices or discounts or extras different from their published list prices, published list discounts, and/or published list extras; that counsel supporting the complaint concede that not over 5% of such total sales involved non-uniformity of prices among the respondents, and that the remaining 15% of such total sales represented sales to large buyers, including mail order houses and railroads, concerning which sufficient information is lacking (without extensive further study of invoices and the taking of testimony) to determine whether or not such instances involved non-uniformity of prices among the respondents.

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"That counsel supporting the complaint concede that, during the depressed business periods of 1932, the early part of 1933, and 1936 and 1938, respectively, the said estimated average percentage of respondents' total sales in which respondents followed the pricing and selling practices hereinbefore set forth was considerably lower than said 95%, and respondents contend that during said depressed business periods said estimated average percentage was considerably lower than said 80%." (R. 893-4.)

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Respondent Columbus McKinnon did not join in the stipulation from which the above is quoted, but separately stipulated that substantially all the sales represented by its invoices which are in evidence were made at the prices contained in its published price lists and published discounts therefrom.

The record also contains evidence with respect to bids submitted by the respondents in response to invitations for bids from the Treasury Department, Procurement Di-

vision, on tire chains, and from the Navy Department on welded and weldless chain. Such evidence shows that the respondent manufacturers of tire chains generally bid their regular published prices on standard unpatented tire chains, with the result that there was almost complete uniformity of the prices bid on such tire chains. In some instances, as shown in Paragraph Eight hereinafter, the higher prices in the bids submitted by some of the respondent manufacturers were the result of agreements and understandings between the respondent manufacturers submitting such higher bids. The bids to the Navy Department by the respondent manufacturers on welded
1931 and weldless chain do not reflect as high a degree of uniformity as do the bids to the Treasury Department, Procurement Division, on tire chains. However, there was a relatively high degree of uniformity in the bids submitted on welded and weldless chain.

The exact degree of adherence to the prices determined by the use of the different pricing methods by all the respondents cannot be determined from the facts in the record. However, the exact degree of adherence is immaterial, since it is clear from the entire record that there were relatively few departures from such prices except during periods of business depression.

PARAGRAPH EIGHT: Respondent American, toward the
1932 end of the 1920's, acquired ownership and control of certain patented inventions covering improvements on tire chains. The improvements are generally referred to as "bar reinforced anti-skid devices" and tire chains embodying said patented inventions are sometimes herein referred to as "bar reinforced" tire chains. Respondent American as licensor entered into agreements with respondents McKay, Hodell, Pyrene, St. Pierre, and Taylor as licensees which agreements provided that the licensee manufacturers, at their option, might either manufacture

1933

their own bar reinforced links or have the same manufactured for them by American. The latter practice was followed by all the licensee manufacturers except McKay. Said agreements between respondent American and the licensee manufacturers contained provisions whereby the licensee manufacturers were required to observe minimum prices and discounts specified by American in selling tire chains embodying the patented features. Respondent American from time to time did designate the prices at which the licensee manufacturers were to sell bar reinforced tire chains, and the prices so designated were generally adhered to by the licensee manufacturers. In instances where a licensee manufacturer failed to adhere to the prices so designated, respondent American called such non-adherence to the attention of the seller and requested an explanation. For example, on October 1, 1940, respondent Kirkpatrick, vice-president of American, wrote F. G. Hodell, president of Hodell, in part:

1934

> "We have just received information that your company has been awarded the North Carolina State Highway Department business through the Tire Sales & Service Company of Raleigh, North Carolina.
>
> "We know there are some bar reinforced tire chains on this bid and we understand that your jobber quoted a cash discount beyond the recommended resale for bar reinforced tire chains.
>
> 1935
>
> "It was my understanding that Mr. Thiebauth telephoned you, calling this mistake to your attention, and that you had instructed your distributor to withdraw the bid.
>
> "This is the first break in price on bar reinforced tire chains that I can think of and I am asking you if our information is correct. I hope there is a mistake somewhere." (Comm. Ex. 8.)

In answering the above, Hodell stated in part:

> "Answering your letter of October 1st, may I say that the facts as related to Mr. Thiebauth over the telephone some days ago are correct. I likewise add further that there was no intention on our part to make any price other than our published prices on bar reinforced tire chains on this bid, and the difference which exists was purely an error caused by confusion in relaying the prices to the jobber in question.
>
> "We had not previously had occasion to instruct this jobber on the subject, as this is the first time we have ever done any business with them. In fact, 1937 their inquiry for this particular transaction was the first negotiation that we had had with this company and their prospects of securing this business were so entirely negligible in the mind of our correspondent, that the matter of correct cash discount was unfortunately overlooked.
>
> "We dislike to have you say that this is a break in the price because we are not breaking any prices and we are most carefully adhering to our Contract in this respect. Within ten minutes after we received Mr. Thiebauth's telephone message and had checked our records we sent a telegram to this jobber advising him to withdraw the price and of his error. All of this is of record with the telegraph company as to filing 1938 of message and in support of the statements we made, and we are sorry there is no way to correct the matter." (Comm. Ex. 7.)

Each of the respondents American, McKay, Pyrene, and Hodell entered into an arrangement with the partnership of Shirley, Olcott & Nichols (sometimes hereinafter referred to as "Shirley") in 1937 whereby the latter

1939

was to act as manufacturer's sales representative in the sale of bar reinforced tire chains to the Federal Government. The arrangement was subsequently extended to cover all types of tire chain manufactured by the said manufacturers. Respondents Taylor and St. Pierre joined the arrangement with Shirley in 1940. Under the arrangement, Shirley submitted bids in its own name to the Procurement Division, Treasury Department, for both bar reinforced and standard tire chains. Bids were also submitted by the manufacturers represented by Shirley. Shirley was awarded contracts to supply tire chains for specified periods of time, and orders received by Shirley under such contracts were apportioned among the respondent manufacturers who were participating in the arrangement. Evidence in the record establishes that respondents American, McKay, Hodell, Pyrene, St. Pierre, and Taylor, with the aid and assistance of Shirley, conspired and agreed as to the prices which were bid by Shirley and by said respondents.

1940

The aforesaid license agreement between respondent American and respondent McKay was terminated on February 6, 1939, and the provisions by which the licensee manufacturers were required to observe minimum prices and discounts specified by American were cancelled in the agreements between American and the other licensees in December, 1942, prior to the issuance of the original complaint herein. Respondent McKay withdrew from the aforesaid arrangement with Shirley on June 30, 1940. Respondents American, Hodell, Pyrene, St. Pierre, and Taylor terminated their arrangements with Shirley in October, 1942.

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All of the respondents herein contend that the above-described acts and practices of certain of the respondents in connection with bar reinforced tire chains were in no way related to and formed no part of the acts and prac-

tices engaged in by all the respondents and that, therefore, it is improper that such allegedly unrelated acts and practices be considered in this proceeding. It is also contended that because of the elimination of the price fixing provisions from the license agreements and the termination of the arrangements with Shirley, no issue remains with respect to such acts and practices which is not now moot. The hearing examiner agreed with these contentions and recommended that the allegations of the amended complaint relating to the aforesaid license agreements and the arrangements with Shirley be dismissed as to all the respondents.

1943 The Commission disagrees with the above contentions and with the hearing examiner's recommendation. Bar reinforced tire chains were generally recognized as being superior in quality to standard unpatented tire chains. Respondent Kirkpatrick testified that American had attempted to keep the price on bar reinforced tire chains approximately fifteen percent higher than the prices on standard tire chains. The published list prices on standard tire chains were uniform for the respondents selling tire chains and sales were generally made in accordance with the published list prices. In view of the superior quality of bar reinforced tire chains, in order to maintain the established uniform prices on standard chains, it was necessary that the prices on bar reinforced tire chains be fixed and maintained at a level substantially higher than the level of the prices on standard tire chains. Consequently, the conspiracy to fix and maintain the prices on bar reinforced tire chains formed a necessary part of the over-all conspiracy to fix and maintain prices on chain and chain products. The fact that some of the respondents did not manufacture or sell bar reinforced tire chains and therefore did not participate in the conspiracy to fix and maintain prices on this particular type

1944

of chain does not constitute sufficient grounds for dismissal as to them of the charges in the amended complaint relating to such acts and practices. The acts and practices by which respondent American and its licensees fixed and maintained prices on bar reinforced tire chains represent only one of the means by which the primary purpose of the over-all combination and conspiracy was effectuated. The arrangements with Shirley were made possible because of the combination and conspiracy between respondent American and its licensees, and because of the understandings and agreements between all of the respondents selling standard tire chains as to the prices at which standard tire chains would be offered for 1946
sale and sold to the Government, as well as to other purchasers. Under the circumstances, the cancellation of the price fixing provisions in the license agreements and the termination of the arrangements with Shirley afford no basis for exempting the described unlawful acts and practices with respect to bar reinforced tire chains from the prohibitions of an order to cease and desist.

PARAGRAPH NINE: The record herein thus establishes that the respondents discussed, and entered into agreements and understandings concerning, current and future prices of chain and chain products. They cooperatively and collectively compiled schedules of common pricing factors to be used and which were used by the respondents selling welded chain, in computing delivered prices on welded 1947
chain. They adopted and used by agreement and understanding a plan whereby the prices and discounts therefrom on chain and chain products announced by respondent American were adopted and followed by other respondent manufacturers. They exchanged with one another, directly and indirectly, information as to the prices at which their products were offered for sale generally, the prices at which offers to sell and sales were made to

particular named customers, and other intimate details of one another's business. Certain of them entered into agreements relating to certain patented inventions covering improvements on tire chain by which the legitimate patent monopoly rights of the owner of the patents were extended beyond the scope of the patents and conspired and agreed as to prices at which tire chains embodying such patented inventions were to be offered for sale and sold to purchasers, including the United States Government. They cooperatively and collectively, through the respondent Institute and otherwise, promoted adherence to the prices agreed upon.

1949 Each of the respondent manufacturers has quoted and sold chain and chain products at prices calculated pursuant to and in accordance with the particular method or system of computing delivered prices applicable to the products it sold, with the knowledge that all the other respondent manufacturers selling the same products were simultaneously doing likewise. In entering into and engaging in the cooperative and collective actions described hereinabove, there was necessarily an understanding and agreement between all of the respondents that each of the respondent manufacturers would continue to use the particular method or system applicable to the type or types of chain each sold. Otherwise, the various cooperative and collective actions entered into and engaged in would not have brought about the results desired. By adhering 1950 to and continuing to use the particular method or system applicable to the type or types of chain it sold, each respondent manufacturer has contributed to and made more effective the understanding and agreement between all the respondents. All users of each of the three methods or systems of computing delivered prices have thus been enabled to present to a prospective purchaser a condition of matched prices in which such purchaser was

isolated and deprived of any choice on the basis of price. The delivered costs to purchasers have not reflected any of the differences in cost of raw materials, other items, or freight delivery from the places of manufacture to the purchaser's delivery points. The principles and forces of competition have been prevented from making and determining the prices of each of the respondent manufacturers.

Pursuant to Count I of the amended complaint, the Commission concludes, and therefore finds, that the respondents have entered into and have engaged in and carried out an understanding, agreement, combination, or conspiracy among themselves to restrain and suppress 1952 competition in the sale of chain and chain products. While the record does not show that each of the respondents has participated in all of the activities relied on to establish said understanding, agreement, combination, or conspiracy, each has acted in concert and cooperation with one or more of the others in doing and carrying out some of the acts and practices herein set forth in furtherance of the understanding or agreement common to them all.

PARAGRAPH TEN: The tendency, capacity and effect of the combination and conspiracy entered into and maintained by the respondents in the manner aforesaid, and the acts and practices performed thereunder and in connection therewith, as set out herein, have been and are to 1953 substantially lessen, hinder, and suppress competition among the respondent manufacturers in the sale of chain and chain products in, among, and between the several States of the United States and in the District of Columbia; to prevent price competition among the respondent manufacturers in the sale of said products; to deprive purchasers of chain and chain products of the benefits of

competition in price; to maintain artificial and monopolistic methods and prices in the sale and distribution of such products; and to create a monopoly in the respondent manufacturers in the sale of such products.

PARAGRAPH ELEVEN: Count II of the amended complaint charges each of the manufacturing respondents with having discriminated in price in the sale of chain and chain products by selling such products to some purchasers thereof at a price higher than the price at which products of like grade and quality were sold to other purchasers, all in violation of subsection (a) of Section 2 of the Clay-
1955 ton Act, as amended. It is alleged that such unlawful discriminations in price resulted from (a) the use of the delivered-price systems described in Count I of the amended complaint and (b) the classification of customers to receive quantity, trade, and other discounts from quoted prices, which resulted in different prices to competing customers. The Commission is of the opinion that the allegations with respect to use of the delivered-price systems do not clearly show that the alleged unlawful discriminations occurred as a result of differences made in the actual prices at which the said products were sold, and that the allegations with respect to the granting of different quantity, trade, and other discounts to competing customers are not sustained; and that, therefore, Count II of the amended complaint should be dismissed as to all of the
1956 respondents.

CONCLUSION

The aforesaid acts and practices of the respondents constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

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By the Commission, Commissioner Carretta not participating for the reason that oral argument on the merits was heard prior to his appointment to the Commission.

(Seal)

ALBERT A. CARRETTA,
Acting Chairman.

Issued: February 16, 1953.

Attest:

D. C. DANIEL,
Secretary.

1958

Order to Cease and Desist.

This proceeding having been heard by the Federal Trade Commission upon the amended complaint of the Commission, answers of the respondents, testimony and other evidence in support of and in opposition to the allegations of said amended complaint taken before a hearing examiner of the Commission theretofore duly designated by it, recommended decision of the hearing examiner, with exceptions thereto, and briefs and oral argument of counsel; and the Commission having issued its order disposing of the exceptions to the recommended decision and having made its findings as to the facts and its conclusion that the respondents, except Walter S. McCann, Alfred Peter Shirley, Floyd Bronson Olcott, and Forrest C. Nichols, have violated the provisions of section 5 of the Federal Trade Commission Act:

1959

IT IS ORDERED that the corporate respondents Chain Institute, Inc., American Chain & Cable Company, Inc., The Bridgeport Chain & Manufacturing Company, The McKay

Company, Pyrene Manufacturing Company, Hodell Chain Company, St. Pierre Chain Corporation, S. G. Taylor Chain Company, Cleveland Chain & Manufacturing Company, Columbus McKinnon Chain Corporation, Campbell Chain Company, Nixdorff-Krein Manufacturing Company, Peerless Chain Company, Round California Chain Company, The John M. Russell Manufacturing Company, Inc., Seattle Chain & Mfg. Company, Turner & Seymour Manufacturing Company, Western Chain Products Company, and Woodhouse Chain Works, their respective officers, representatives, agents, and employees, and the individual respondents, Dennis A. Merriman, Wm. D. Kirkpatrick,
1961 Frank A. Bond, and George J. Campbell, Jr., their respective representatives, agents and employees, in or in connection with the offering for sale, sale, and distribution of chain or chain products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between or among any two or more of said respondents, or between any one or more of said respondents and others not parties hereto, to do or perform any of the following things:

(1) Establish, fix, or maintain prices, terms, or conditions of sale for chain or chain products or adhere
1962 to any prices, terms, or conditions of sale so fixed or maintained.

(2) Directly or indirectly investigate or check the prices, terms, or conditions of any sale of, or offer to sell, chain or chain products to any purchaser or prospective purchaser for the purpose or with the effect of aiding or assisting in maintaining uniform prices, terms, or conditions in the sale of chain or chain products.

(3) Exchange or distribute among the corporate respondents, or any of them, price lists or other information showing current or future prices, terms, or conditions of sale, for the purpose, or with the effect, of fixing or of aiding or assisting in maintaining uniform prices, terms, or conditions of sale in the sale of chain and chain products.

(4) Adopt, use, or in any way follow any price quotation announced by particular respondents, or any of them, whereby quotations are made uniform or matched.

(5) Collect, compile, circulate, or exchange information concerning common carrier transportation charges used or to be used as a factor in computing the price of chain or chain products; or use, directly or indirectly, any such information so collected, compiled, or received as a factor in computing the price of chain or chain products. 1964

(6) Quote or sell chain or chain products at prices calculated or determined pursuant to or in accordance with the single basing point delivered-price system, the freight equalization delivered-price system, or the zone delivered-price system; or quote or sell chain or chain products at prices calculated or determined pursuant to or in accordance with any other plan or system which results in identical price quotations or prices for chain or chain products at points of quotation or sale or to particular purchasers by any two or more sellers of chain or chain products using such plan or system or which prevents purchasers from finding any advantage in price in dealing with one or more as against another seller. 1965

(7) Do or cause to be done any of the things forbidden in the preceding paragraphs of this order

through respondents Chain Institute, Dennis A. Merriman, or any other corporation, organization, or individual.

IT IS FURTHER ORDERED that nothing contained herein shall be construed as prohibiting the establishment or maintenance of bona fide agreements, understandings, or other relations between any corporate respondent and its officers, directors, and employees, or between any corporate respondent and any of its subsidiaries or affiliates, relating to the sole and separate business of said corporation and its subsidiaries or affiliates, when not for the
1967 purpose or with the effect of unlawfully restricting competition.

IT IS FURTHER ORDERED that each of the corporate respondents American Chain & Cable Company, Inc., The Bridgeport Chain & Manufacturing Company, The McKay Company, Pyrene Manufacturing Company, Hodell Chain Company, St. Pierre Chain Corporation, S. G. Taylor Chain Company, Cleveland Chain & Manufacturing Company, Columbus McKinnon Chain Corporation, Campbell Chain Company, Nixdorff-Krein Manufacturing Company, Peerless Chain Company, Round California Chain Company, The John M. Russell Manufacturing Company, Inc., Seattle Chain & Mfg. Company, Turner & Seymour Manufacting Company, Western Chain Products Company,
1968 and Woodhouse Chain Works, its officers, representatives, agents, and employees, in or in connection with the offering for sale, sale, and distribution of chain or chain products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from quoting or selling chain or chain products at prices calculated or determined pursuant to or in accordance with a single basing point delivered-price system, a freight equalization delivered-price system, or a zone delivered-price

system, for the purpose or with the effect of systematically matching the delivered-price quotations or the delivered prices of other sellers of chain or chain products and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another.

IT IS FURTHER ORDERED, for reasons appearing in the findings as to the facts in this proceeding, that the allegations of Count I of the amended complaint herein be, and they hereby are, dismissed as to respondents Walter S. McCann, Alfred Peter Shirley, Floyd Bronson Olcott, and Forrest C. Nichols. 1970

IT IS FURTHER ORDERED that the allegations of Count II of the amended complaint be, and they hereby are, dismissed as to all of the respondents.

IT IS FURTHER ORDERED that the respondents, except Walter S. McCann, Alfred Peter Shirley, Floyd Bronson Olcott, and Forrest C. Nichols, shall, within sixty (60) days from service upon them of this order, file with the Commission a report in writing showing in detail the manner and form in which they have complied with this order.

By the Commission, Commissioner Mason dissenting and Commissioner Carretta not participating for the reason that oral argument on the merits was heard prior to his appointment to the Commission. 1971

SEAL

D. C. DANIEL,
Secretary.

Issued: February 16, 1953.

1972

Dissenting Opinion of Commissioner Lowell B. Mason.

Here, as in its companion case, *National Lead Company*, Docket 5253, the principal question our superior courts must answer is whether the Commission has the general injunctive powers of an equity court, or may we only prohibit those acts which we in our findings of fact have found to be unlawful. In the event this case is judicially reviewed before National Lead, I incorporate in the record of this case that portion of my dissent in National Lead that bears on this important inroad on the judicial function.[1]

Besides this fundamental issue there are other ques-
1973 tions that must be dealt with. Count 2 (the so-called mill net theory count) is a relic of the days when the prosecution staff of the Commission was enamored of the idea that entrepreneurs who paid the freight on their produce to markets away from home discriminated in price to some customers because they profited less on goods sold out of town than on the same kind of goods sold across the street.

This threatened strangulation of small concerns which have only one point of production was happily frustrated by subsequent orders of the Commission in other cases,[2] and it is with hearty accord that I concur with the majority in the frustration of this ideological tour de force.

As to Count 1:

1974 Assuming, but not necessarily deciding, that the record in this proceeding will support the finding of the majority that the respondents have entered into and carried out an unlawful conspiracy, the order to cease and desist is nevertheless objectionable.

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[1] Appendix.

[2] *Clay Products Association, Inc.*, Docket 5483; *Clay Sewer Pipe Association, Inc.*, Docket 5484; *National Lead Company*, Docket 5253.

The order in this case, like the order in Docket 5253, *National Lead Company, et al.*, goes further than to suppress practices found to be unlawful. No finding is made, and clearly none could be made, that the independent use by one of the respondents of a single basing point delivered-price system, a freight equalization delivered-price system, or a zone delivered-price system is illegal. It is not even found, and no contention is made that it could be found, that the use by any of the respondents of any of these systems "for the purpose or with the effect of systematically matching" the prices of competition is illegal. It is thus clear that the order to cease and desist is not based on the findings.

I am against it.

LOWELL B. MASON,
Commissioner.

Filed February 16, 1953.

Appendix to Above Dissenting Opinion of Commissioner Lowell B. Mason

BEFORE FEDERAL TRADE COMMISSION
Docket No. 5253

In the Matter of
NATIONAL LEAD COMPANY, ET AL.

In my opinion, the complaint was filed and the case stands or falls on the concurrent knowledge of defendants that the substantial price similarity of their lead pigments was arrived at by substantially similar pricing factors—in short—"conscious parallelism."

1978

Appendix to Above Dissenting Opinion of Commissioner Lowell B. Mason.

For over two decades economic theorists have sought ways to condemn conscious parallelism. The old Federal Trade Commission originated this crusade in the early 1940's and filed numerous complaints accusing defendants with charging prices for their goods with knowledge that others charged the same price. The first order against conscious parallelism to reach the court was *Federal Trade Commission* v. *Rigid Conduit.*[18] The Circuit Court of Appeals sustained the order and the Supreme Court refused to reverse on a tie vote. However, the decision was a pyrrhic victory, for congressional and public clamor
1979 against this decision was so strong that no court proceeding has ever been initiated to enforce it. Until now, all subsequent disposition of cases where conscious parallelism was alleged in the complaint have carefully avoided the type of order issued in *Rigid Conduit.*[19]

But now conscious parallelism again raises its bureaucratic head in this and a companion case,[20] tentatively and collaterally, but not directly, for the instant cases do not find conscious parallelism illegal in their findings of fact, but prohibit it in the orders to cease and desist. The order is justified on what I call a spiral rationale, circular in motion but not coming out where it started:

1. Conscious parallelism is not of itself illegal;

1980 2. But evidence of conscious price parallelism may give the Commission the power to imply conspiracy;

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[18] *Triangle Conduit and Cable Company* vs. *Federal Trade Commission*, 168 F. 2d 175 (7th Cir. 1948), aff'd sub nom *Clayton Mark Co.* vs. *Federal Trade Commission*, 336 U. S. 956 (1949).

[19] *Clay Products Association, Inc.*, Docket 5483; *Clay Sewer Pipe Association, Inc.*, Docket 5484.

[20] *Chain Institute, Inc., et al.*, Docket 4878.

3. Conspiracy is illegal;

4. With a finding of conspiracy, the Commission assumes the power to prevent its continuation by prohibiting conscious price parallelism;

5. Conscious parallelism is illegal.

Ignoring for the moment the impracticality of carrying out an order against conscious parallelism, and casting aside the question as to whether the Federal Trade Commission is endowed with such complete equity court powers, let us see if there are sounder ways of testing the economic 1982
validity of conscious parallelism than all this legalistic folderol about conspiracies that don't exist.

We need tests which can be applied on a factual basis.

At the same time the Commission originated its drive against conscious parallelism as the enemy of free enterprise, a more realistic concept of competition was being developed by economists which held where even if pricing formulas were known and substantially paralleled (as here), "the significant test was to look for the independence and competitiveness of the rivals."[21]

Workable competition, as developed by Professor J. M. Clark, Dean Edward S. Mason and the late Professor Joseph A. Schumpeter, as well as Professors E. P. Lernerd, 1983
M. P. McNair and F. S. Teele, placed the emphasis on the longer range aspects of a progressive economy; not on an assumed unchanged equilibrium of demand and supply, but on changes which included population growth, the discovery of natural resources, developments in technology, advances in the art of management, and many others.

[21] R. H. Meriam's "Bigness in the Economic Analysis of Competition," Harvard Business Review, March 1950.

1984 *Appendix to Above Dissenting Opinion of Commissioner Lowell B. Mason.*

Stress was laid on the constructive role of entrepreneurs in expanding demand and improving products. National brand advertising was something more than an effort to insulate against the price raids of competitors. It recognized that the businessman often made investments of time and money ahead of current demands. Under the doctrine of workable competition, large business units may have put more competitive pressure on small units than was desirable, but every injury to a small competitor was not necessarily an injury to competition. Competition in a growing economy was bound to put pressure on inefficient
1985 competitors, whatever their size.

* * * * * * *

To condemn conscious parallelism sans conspiracy is to disarm the smaller competitor in his already handicapped battle against multiple-point producers.

I am against it.

LOWELL B. MASON,
Commissioner.

1986

1987

Order Disposing of Motions for Modification or Setting Aside of Findings as to the Facts, Conclusion, and Order to Cease and Desist; Modifying Order to Cease and Desist and Dismissing Complaint as to Respondent Frank A. Bond.

This matter came on to be heard by the Commission upon the application and motion, with supporting affidavits and memorandum, for modification or setting aside of the findings as to the facts, conclusion, and order to cease and desist, filed by respondents Chain Institute, Inc., American Chain & Cable Company, Inc., The Bridgeport Chain & Manufacturing Company, The McKay Company, Hodell Chain Company, St. Pierre Chain Corporation, S. G. Taylor Chain Company, Cleveland Chain & Manufacturing Company, Campbell Chain Company, Nixdorff-Krein Manufacturing Company, Peerless Chain Company, Round California Chain Company, The John M. Russell Manufacturing Company, Inc., Seattle Chain & Mfg. Company, Turner & Seymour Manufacturing Company, Western Chain Products Company, Woodhouse Chain Works, Dennis A. Merriman, Wm. D. Kirkpatrick, and George J. Campbell, Jr.; the motion, with supporting affidavit, to vacate or modify the findings as to the facts, conclusion, and order to cease and desist, filed by respondent Columbus McKinnon Chain Corporation; answer to said motions filed by counsel supporting the complaint; and reply to said answer filed by certain of the respondents.

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The Commission having duly considered the motions filed by certain of the respondents herein for the setting aside or modification of the findings as to the facts, conclusion, and order to cease and desist, and the requests for permission to file briefs and to be heard in oral argument on such motions, answer of counsel supporting the complaint, reply to certain of the respondents, and pertinent portions of the record, and being of the opinion, for the

1990 *Order Disposing of Motions for Modification or Setting Aside of Findings as to the Facts, Conclusion, and Order to Cease and Desist; Modifying Order to Cease and Desist and Dismissing Complaint as to Respondent Frank A. Bond.*

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reasons appearing in the accompanying opinion of the Commission, that said motions and requests are without merit except for the request that the complaint be dismissed as to respondent Frank A. Bond:

It is ordered that the application and motion for modification or setting aside of the findings as to the facts, conclusion, and order to cease and desist, filed by respondents Chain Institute, Inc., American Chain & Cable Company, Inc., The Bridgeport Chain & Manufacturing Company, The McKay Company, Hodell Chain Company, St. Pierre Chain Corporation, S. G. Taylor Chain Company, Cleveland Chain & Manufacturing Company, Campbell Chain Company, Nixdorff-Krein Manufacturing Company, Peerless Chain Company, Round California Chain Company, The John M. Russell Manufacturing Company, Inc., Seattle Chain & Mfg. Company, Turner & Seymour Manufacturing Company, Western Chain Products Company, Woodhouse Chain Works, Dennis A. Merriman, Wm. D. Kirkpatrick, and George J. Campbell, Jr., and the motion to vacate or modify the findings as to the facts, conclusion, and order to cease and desist, filed by respondent Columbus McKinnon Chain Corporation, and the requests for permission to file briefs and to be heard in oral argument on said motions, be, and they hereby are, denied except for the request that the complaint be dismissed as to respondent Frank A. Bond.

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It is further ordered that the order to cease and desist heretofore entered in this matter be, and it hereby is, modified by striking therefrom Frank A. Bond as a respondent against whom said order was directed.

Order Disposing of Motions for Modification or Setting Aside of Findings as to the Facts, Conclusion, and Order to Cease and Desist; Modifying Order to Cease and Desist and Dismissing Complaint as to Respondent Frank A. Bond.

1993

IT IS FURTHER ORDERED that the amended complaint herein be, and it hereby is, dismissed as to respondent Frank A. Bond.

By the Commission, Commissioner Carretta dissenting in part and concurring in part.

(Seal)

ALEX. AKERMAN, JR.,
Secretary.

1994

Opinion of the Commission.

Chairman HOWREY delivered the Opinion of the Commission.

This is one of a number of motions, filed in recent months, to reopen and reconsider matters, previously adjudicated, upon the ground that there have been changes in the membership of the Commission.

This particular case was decided during February 1953, when the Commission was comprised of Commissioners Mead, Mason, Carson, Spingarn and Carretta, and is now pending before the United States Court of Appeals for the Eighth Circuit. Of the present Commission, Commissioner Mead is the only member who voted with the majority when the case was adjudicated on the merits. Commissioner Mason dissented. Commissioner Carretta did not participate for the reason that oral argument was heard before he became a member. Chairman Howrey and Commissioner Gwynne have not, of course, participated in any phase of the proceeding.[1]

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[1] Chairman Howrey became a member of the Commission on April 1, 1953, and Commissioner Gwynne on September 27, 1953.

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The complaint was issued on December 22, 1942. Lengthy hearings were held before a hearing examiner and concluded in August 1948. The examiner issued a recommended decision on September 25, 1948, and an amended decision at a later date. Thereafter, an appeal was taken to the full Commission, and oral argument was heard on April 7, 1949. The case was re-argued before the Commission on September 24, 1950.

On April 20, 1953, respondents filed their petition for review with the court of appeals. However, prior to the time the record was certified to that court and following the aforementioned changes in the membership of the Com-

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mission, respondents filed the present motion asking us to reopen and reconsider a number of enumerated questions.

It appears to us that the controlling ground offered by respondents in support of the motion is this change in membership.

We are not disposed to grant a motion predicated principally upon such a ground. The Commission is an independent and continuing statutory body. The terms of its members were arranged by Congress in a manner to prevent any abrupt dislocations in the discharge of its responsibilities.

More importantly, the Commission, like the courts, operates prospectively, not retroactively. This principle is fun-

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damental, we believe, to our system of law, both administrative and judicial. While the views of individual commissioners may differ, each is like a member of the judiciary in the sense that he customarily makes decisions on upcoming issues on a case-by-case basis. A judge appointed to fill a vacancy on the bench does not set about to reopen and retry previously adjudicated cases simply because he is a new member.

The machinery of the quasi-judicial agency, like the courts, contemplates a continuing process; it looks to current litigation, not past litigation. If our procedures were otherwise, delay and inaction would surround enforcement of the statutes committed to the Commission's jurisdiction. To grant the present motion would be to require a third review of a voluminous record made many years ago.

The principal question presented by the motion, as we see it, is whether the Commission, in prescribing a remedy in a conspiracy case, can require respondents not only to cease and desist their alleged conspiratorial activity but also to stop the individual use of certain delivered pricing 2000
methods. This is an important question and if it were not for the overriding considerations already stated, the motion might be well grounded. However, since the question of the remedy is one of law, the respondents will not be prejudiced. They will, we are certain, receive a full hearing on this question in the court of appeals.

Commissioner Mead has filed a separate opinion.

Commissioner Carretta has filed a separate opinion dissenting in part and concurring in part.

Filed December 28, 1953.

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2002

Separate and Concurring Opinion of Commissioner Mead.

The Commission, on February 16, 1953, made its findings as to the facts and conclusion based thereon and issued its order to cease and desist in this matter. All of the respondents against whom the order to cease and desist is directed, except Frank A. Bond (who died subsequent to the time the case was originally presented to the Commission) and Pyrene Manufacturing Company, have filed motions requesting that the findings as to the facts, conclusion, and order to cease and desist be vacated or set aside or, in the alternative, that the findings and order be modified in material respects. Permission to file briefs and to be heard
2003 in oral argument on the motion was requested.

The Commission has denied the motions and the requests for permission to file briefs and to be heard in oral argument for the reason that the respondents have presented no matters which were not before the Commission at the time it made its decision, and an order to that effect is being entered herewith. I am in entire agreement with the Commission's action in denying the motions for the reasons stated. The respondents in their motions have raised questions as to the validity of and necessity for the provision in the order to cease and desist which prohibits each of the respondent manufacturers from using any one of the three delivered pricing methods they have heretofore used as a part of their conspiracy "for the purpose
2004 or with the effect of systematically matching the delivered-price quotations or the delivered prices of other sellers of chain or chain products and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another." I was a member of the Commission at the time the original decision was made. I deem it in the public interest to issue this opinion setting forth some of the considerations which led me to conclude then and to conclude now that the inclusion of

such prohibition in the order to cease and desist was not only valid but necessary for effective relief from the conspiracy in which the respondents have engaged. In this opinion I am speaking only for myself.

The validity of and necessity for a prohibition such as that here under consideration in a situation where, as here, the maintenance of and adherence to a delivered pricing method or system constituted the very heart of the conspiracy found are fully discussed in the opinion of the Commission in the matter of *National Lead Company, et al.*, Docket 5253, January 12, 1953. The reasons there set forth for including such a prohibition in the order to cease and desist in that case are applicable to this case. 2006

The Commission, having found that the respondents had engaged in a conspiracy to restrain and suppress competition in the sale of chain and chain products, had the duty to determine the remedy necessary to suppress and insure against a revival of the trade-restraining conspiracy. In making such determination we considered a number of factors, including the fact that each of the respondent manufacturers quoted and sold chain and chain products at prices calculated pursuant to and in accordance with the particular method or system of computing delivered prices applicable to the products it sold with the knowledge that all other respondent manufacturers selling the same products were simultaneously doing likewise. The various cooperative and collective activities which the evidence clearly 2007
shows that the respondents engaged in would not have brought about the results desired in the absence of an understanding between all of the respondents that each of the respondent manufacturers would continue to use the particular delivered pricing method applicable to the products it sold. The use of the different delivered pricing methods or systems thus constituted an integral part of the over-all conspiracy among and between the respondents. A major-

ity of the Commission was of the opinion that an effective order in this case must not only prohibit the respondents from "entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy" to engage in the particular practices by which the conspiracy had been effectuated, but must also prohibit the individual use of a particular delivered pricing system or method "for the purpose or with the effect of systematically matching the delivered-price quotations or the delivered prices of other sellers of chain or chain products and thereby preventing purchasers from finding any advantage in price in dealing
2009 with one or more sellers as against another." Such a prohibition was necessary not because it is unlawful in all circumstances for an individual seller, acting independently, to sell its products on a delivered-price basis, but to make the order fully effective against the trade-restraining conspiracy in which each of the respondents participated.

There were three different kinds of chain involved in this proceeding, namely, welded chain, weldless chain, and tire chain. As shown in the Commission's findings, welded chain was generally quoted and sold on a "Pittsburgh plus" or single basing point delivered-price method or system. Weldless chain was generally quoted and sold on a freight equalization delivered-price method or system. Tire chain was generally quoted and sold on a single zone, or as re-
2010 spondents prefer to call it, a universal delivered-price method or system. All of the respondent manufacturers did not manufacture all three types of chain, but some of them did. Each of them used the particular delivered pricing method or system applicable to the products it sold.

The maintenance of the different delivered pricing systems constituted the very cornerstone of the conspiracy among and between the respondents. The adherence to

the applicable system by each of the respondent manufacturers was necessary to make the conspiracy effective. The matching of delivered prices was one of the objectives of the conspiracy and this was accomplished through the use of the different delivered pricing systems. Unless and until each of the respondent manufacturers is prohibited from so adhering to a particular delivered pricing system, the evils springing from the conspiracy, one of which is to eliminate price competition, may well continue indefinitely. Unless the respondent manufacturers, representing practically the entire economic power of the industry, are deprived of the device which made the combination effective, an order merely prohibiting the combination may well 2012
be a useless gesture.

If the usual type of conspiracy order had been entered in this case, the respondents would have been prohibited from agreeing to fix prices and from agreeing to do a number of other specified things they had been doing as a part of their conspiracy. The respondent manufacturers would not have been prohibited from continuing to use, without any agreement between them, the same delivered pricing systems they had been using and thus continuing to enjoy the fruits of their conspiracy. The effects of the conspiracy, one of which was the elimination of price competition, might continue for some time unless effective measures to break it up were taken. That is the purpose of the prohibition in the order to cease and desist directed against each of the respondent manufacturers individually. In my 2013
opinion, the effect of the order to cease and desist will be to restore a condition of sharp and healthy competition in the chain industry. I realize that in such competition the weak may be hurt, but social security is not the province of the Commission. The only way to have competition is to compete. If, after competition is restored in the industry, any of the respondents can make a proper showing that this prohibition or any other prohibition in the order

is no longer necessary or desirable, the Commission, of course, will at that time take such action as may be appropriate in the light of the facts and the law.

In my opinion the Commission has the power to take the steps necessary to correct the evils found to exist in this industry. The courts in addition to recognizing the power of the Commission to stop any method of competition, even though individually pursued, if it has a dangerous tendency unduly to hinder competition or create a monopoly, have also clearly indicated the extent to which the Commission may go in an effort to make its orders effective and to prevent evasion. In the case of *Hershey Chocolate Corporation*
2015 v. *Federal Trade Commission*, for example, the Court of Appeals for the Third Circuit, in upholding the Commission's order notwithstanding attack on the ground that it went beyond the scope of the complaint, said:

> "* * * the Commission's power would be limited indeed if it were restricted to enjoin unfair acts of competitors only as evidenced in the past. To be of any value the order must proscribe the method of unfair competition as well as the specific acts by which it has been manifested. In no other way could the Commission fulfill its remedial function" (121 F. 2d 968, 971-972).

In the case of *Local 167* v. *United States*, 291 U. S. 293,
2016 299, involving conspiracy among a number of defendants, the defendants sought to eliminate from the injunction certain provisions enjoining conduct which they contended had not been proved to be a part of the conspiracy. The Court held—

> "The United States is entitled to effective relief. To that end the decree should enjoin acts of the sort that are shown by the evidence to have been done or threatened in furtherance of the conspiracy. It should

be broad enough to prevent evasion. In framing its provisions doubts should be resolved in favor of the Government and against conspirators."

In *National Labor Relations Board* v. *Express Publishing Company*, 312 U. S. 426, 435-437, the Supreme Court said—

"A federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past.

"It is a salutary principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts. 2018

"Having found the acts which constitute the unfair labor practice the Board is free to restrain the practice and other like or related unlawful acts. * * * The breadth of the order, like the injunction of a court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts * * * found to have been committed * * * in the past."

In the case of *Haskelite Mfg. Corporation* v. *Federal Trade Commission*, the Court of Appeals for the Seventh Circuit accepted and applied the same principle and held that the Commission could prescribe reasonable requirements and "guarantees against a recurrence of the past unfair and deceptive acts" and which "were calculated to aid in dispelling for the future the unfair and deceptive practices of the past" (127 F. 2d 765, 766). 2019

Nor is the relief to which the Commission is entitled limited to the performance of "other related unlawful acts,"

2020 *Separate and Concurring Opinion of Commissioner Mead.*

referred to by the Court in the Express Publishing Company case. Even acts lawful in themselves may be prohibited when they cannot be separated from the unlawful scheme of which they are a part. The applicable law has been settled by the Supreme Court. In the Ethyl Gasoline case (*Ethyl Gasoline Corporation, et al.* v. *United States*, 309 U. S. 436), the Supreme Court disposed of a contention that the decree should not extend to the prohibition of a device that could be lawfully used, as follows:

> "Since the unlawful control over the jobbers was established and maintained by resort to the licensing device, the decree rightfully suppressed it even though
2021 it had been or might continue to be used for some lawful purposes. The court was bound to frame its decree so as to suppress the unlawful practices and to take such reasonable measures as would preclude their revival" (p. 461).

Two years later, in the case of *United States* v. *Univis Lens Company, Inc., et al.*, 316 U. S. 241, the Court again applied the same rule. It said that even assuming the validity of certain licensing restrictions, "these features are so interwoven with and identified with the price restrictions which are the core of the licensing system that the case is an appropriate one for the suppression of the entire licensing scheme even though some of its features, independently established, might have been used for lawful pur-
2022 poses" (p. 254).

Under all the circumstances, in the light of the entire record, including the motions now before the Commission, I am of the opinion that the prohibition in the order against the persistent, continuing, and intended matching of prices through the use by each of the respondents of one or more delivered pricing systems was particularly appropriate.

Filed December 28, 1953.

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Opinion of Albert A. Carretta Dissenting in Part and Concurring in Part With the Order of the Commission.

This matter is before the Commission upon an "Application and Motion for Modification or Setting Aside of Findings as to the Facts, Conclusion and Order to Cease and Desist" filed in behalf of Chain Institute, Inc. and 19 other corporate and individual respondents. Included in said application was also a motion to the effect that the Order to Cease and Desist herein be modified by including therein a provision dismissing the amended complaint against respondent Frank A. Bond, for the reason that said respondent died on July 3, 1950.

There is also before the Commission a "Motion of Re- 2024
spondent Columbus McKinnon Chain Corporation to Vacate or Modify Findings as to the Facts, Conclusion and Order to Cease and Desist." This motion is somewhat similar to the Application and Motion filed in behalf of Chain Institute, Inc. and others, and it includes the additional request that the proceedings be dismissed as to respondent Columbus McKinnon Chain Corporation.

In the two motions which have been filed, permission was requested to file briefs and to be heard in oral argument.

The Commission, by order, has denied both motions except insofar as the first motion requested dismissal of the proceedings as to respondent Frank A. Bond. While I concur in the decision of the Commission to the extent that the proceeding herein should be dismissed as to respondent 2025
Frank A. Bond, I disagree with the conclusion reached by my colleagues in denying respondents the opportunity to be heard orally upon their motions.

Because the above-mentioned separate motions are somewhat similar, I shall limit my discussion to the contents of the Application and Motion filed in behalf of Chain Institute, Inc. and others. However, my comments and my con-

2026 *Opinion of Albert A. Carretta Dissenting in Part and Concurring in Part With the Order of the Commission.*

clusion apply with equal force to the motion filed in behalf of respondent Columbus McKinnon Chain Corporation.

This dissent is being filed with full knowledge and appreciation of the fact that the original complaint in this matter was issued by the Federal Trade Commission on December 22, 1942—more than 11 years ago. It is also realized that the granting of respondents' motions would necessitate a further delay in the final disposition of this case. However, the Federal Trade Commission, when acting in its quasi-judicial capacity, must be more concerned with due process and with equity than with speed in arriving
2027 at its decisions.

In its Application and Motion for Modification or Setting Aside of Findings as to the Facts, Conclusion and Order to Cease and Desist, the respondents Chain Institute, Inc. and others, prayed for the following relief:

> 1. That the Findings as to the Facts, Conclusion and Order to Cease and Desist issued by the Commission in said proceeding on February 16, 1953 be set aside in their entirety by the Commission, and that the Commission, in lieu thereof, issue Findings as to the Facts to the effect that the allegations of the amended complaint in said proceeding have not been established by the evidence in said proceeding, and a Conclusion
> 2028 to the effect that the respondents in said proceeding have not violated either of the statutes mentioned in said amended complaint, and an Order to the effect that said amended complaint be dismissed with prejudice: *or in the alternative*

2. That said Findings as to the Facts issued by the Commission in such proceeding on February 16, 1953 be modified in certain enumerated respects.

3. That said Order to Cease and Desist issued by the Commission in said proceeding on February 16, 1953 be modified in the following respects:

(a) That there be deleted in its entirety from said Order to Cease and Desist the subparagraph numbered "(6)" which appears as one of series of numbered subparagraphs under a main paragraph which begins with the words "IT IS ORDERED" and

(b) That there be deleted in its entirety from said Order to Cease and Desist the paragraph thereof which begins with the words "IT IS FURTHER ORDERED that each of the corporate respondents" and ends with the words "one or more sellers as against another." 2030

In an affidavit submitted by counsel representing the respondents Chain Institute, Inc. and others, various grounds were therein set forth in support of the application and motion, and in support of respondents' request for permission to argue orally before the Commission. For the majority of the Commission to have reached its conclusion that respondents' application and motion should be denied (except insofar as it applied to the dismissal of the proceeding against Frank A. Bond), it was necessary for the Commission to conclude that *each and every ground* cited by respondents was without merit. I cannot reach the same conclusion as the majority of the Commission did 2031
because I feel that at least one ground cited by the respondents entitles them to the privilege of being heard in oral argument before the Commission. That particular ground is stated in Paragraph 6(a)(6) on pages 5 and 6 of the "Affidavit of Sumner S. Kittelle in Support of Application and Motion of Respondents for Modification or Setting Aside of Findings as to the Facts, Conclusion and Order to Cease and Desist." That particular ground refers to

2032 *Opinion of Albert A. Carretta Dissenting in Part and Concurring in Part With the Order of the Commission.*

the Paragraph in the Order of the Commission to Cease and Desist dated February 16, 1953, which reads as follows:

> "IT IS FURTHER ORDERED that each of the corporate respondents (the various respondents are then named), its officers, representatives, agents, and employees, in or in connection with the offering for sale, sale, and distribution of chain or chain products in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from quoting or selling chain or chain products at prices calculated
> 2033 or determined pursuant to or in accordance with a single basing point delivered-price system, a freight equalization delivered-price system, or a zone delivered-price system, for the purpose or with the effect of systematically matching the delivered-price quotations or the delivered prices of other sellers of chain or chain products and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another."

With respect to the foregoing quoted paragraph, the respondents state:

> "Respondents had no opportunity to argue the merits or demerits of the paragraph of the Order to Cease
> 2034 and Desist herein which, in substance, prevents any respondent, individually and non-collusively, from using any of the delivered pricing methods to meet competition regularly or systematically. No such paragraph was incorporated in the proposed order to cease and desist filed by the Trial Examiner in this proceeding, nor was there anything in the record, briefs or arguments to indicate that any such drastic

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and far-reaching paragraph was contemplated. No provision like said paragraph was ever inserted by the Commission in any of its orders in any contested proceeding prior to the *National Lead Company* case, Docket No. 5253, and both the majority and dissenting opinions in said case demonstrate that said paragraph was and is a highly novel and controversial one. The Order in the *National Lead* case was issued January 12, 1953, only about a month before the Order in this proceeding."

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Without passing upon the question as to whether a paragraph of this nature is proper or improper in an order of the Commission, it is my opinion that the respondents herein should have been afforded the opportunity to submit arguments to the Commission *against* the inclusion of such a paragraph. Of course, counsel in support of the complaint should also have been heard *in support of* the inclusion of such a paragraph in an order of the Commission. This opportunity not having been afforded to the respondents and to counsel in support of the complaint by the then existing Commission, it appears to me imperative that the existing Commission should correct such defect in the proceedings. This position I would hold whether or not any change in the personnel of the Commission had occurred between the date of the Order of the Commission and the date of filing of the motion for review. It cannot be denied that this paragraph enjoins the respondents from *individually* engaging in certain practices which they may not engage in in concert with others. I do not want it to be understood that I would not, myself, vote for the inclusion of such a paragraph in an order of the Commission after being fully advised of the best arguments which could be presented by both sides.

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2038 *Opinion of Albert A. Carretta Dissenting in Part and Concurring in Part With the Order of the Commission.*

It is to be noted that in this proceeding, the Trial Examiner, under date of September 23, 1948, filed his "Recommended Decision" which was also included as part thereof a "Recommended Order." It was that Order which was briefed by both sides, and it was that Order which was argued orally before the Commission. An examination of that Order will disclose that the subject paragraph was not contained in the Recommended Order of the Trial Examiner. However, after twice hearing oral argument upon the Recommended Decision of the Trial Examiner, the Commission, out of a clear sky, decided to impose the re-
2039 strictions contained in the above-quoted paragraph.

How consistent is the Commission in guaranteeing "due process" [1] to respondents before the Commission? At the present time, and I understand that the following has been the practice for more than three years, when a Hearing Examiner completes a case, he files with the Secretary of the Commission an "Initial Decision" which includes a form of Order to Cease and Desist which becomes the Order of the Commission unless (1) either side files an appeal with the Commission; or (2) the Commission, by order, stays the effective date of the decision; or (3) the Commission, upon its own initiative, issues an order placing the case on its own docket for review. When the Commission places the case on its own docket for review, it considers the record therein; and if, for any reason, the
2040 Commission is of the opinion that the Findings or Order to Cease and Desist should be modified in any respect, it serves upon the respondent and upon counsel in support

[1] Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, *in its most comprehensive sense*; to be heard, by *testimony or otherwise*, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved

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of the complaint a "Tentative Decision of the Commission." This "Tentative Decision of the Commission" includes modified Findings as to the Facts, Conclusion and Order to Cease and Desist. These papers apprise the respondent and counsel in support of the complaint of the changes which the Commission intends to make in the findings and order as submitted by the Hearing Examiner. Each side is then offered an opportunity to file, within 20 days, an appropriate memorandum or brief setting forth any objections which they may have to the changes contemplated by the Commission in the Hearing Examiner's Initial Decision. Further, after such objections, if any, are filed, each side is afforded the opportunity to reply to the objections of the other party within a period of 10 days after the filing of such objections.

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If the foregoing is the current practice, why should not the parties in the subject case be afforded the same opportunity to argue either for or against the changes which the Commission made in the order as recommended by the Trial Examiner?

To say that the respondents herein have a remedy in the courts is for the Commission to pass its burden upon the already over-crowded dockets of the courts. It is our duty to be fully advised in all matters upon which we sit as judges, and we cannot shirk our duty by saying that parties have an adequate remedy in the courts.

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Consequently, it is my opinion that both motions filed herein should have been granted by the Commission, *but only* to the extent that both counsel for the respondents and counsel in support of the complaint should have been afforded the opportunity to file briefs and to argue orally before the Commission upon any provisions contained in the Order to Cease and Desist issued by the Commission which were at variance with the provisions in the "Recom-

2044 *Concurring in Part With the Order of the Commission.*

mended Order" contained in the "Recommended Decision" filed by the Trial Examiner herein. This same opportunity should be afforded all respondents whenever the Commission intends to make a "change of substance" in any recommended order of a Hearing Examiner. If the change contemplated by the Commission is "de minimis," then I might hold that denial of an opportunity to be heard would not deprive the respondent of "due process."

Because the opinion of the Commission in this matter, as prepared by Chairman Howrey, discusses at some length the matter of reopening previously adjudicated cases upon the ground that there have been changes in
2045 the membership of the Commission, I should like to state that I concur in the reasoning of the majority of the Commission in concluding that, *standing alone*, a change in the membership of the Commission is without merit to support a petition of a respondent for an opportunity to argue orally before the Commission upon a matter already decided.

I also concur with the majority of the Commission in concluding that the Order to Cease and Desist heretofore entered in this matter be modified by striking therefrom Frank A. Bond as a respondent against whom said order was directed, and in concluding that the amended complaint herein be dismissed as to him.

2046 ALBERT A. CARRETTA,
Commissioner.

Filed December 28, 1953.

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Stipulation as to Certain Basic Background Facts

(The paragraphs herein are, as far as practicable, designated by the same numbers as are the paragraphs of the amended complaint which they concern.)

PARAGRAPH ONE: Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on October 9, 1945, issued its amended complaint against the respondents named in the caption hereof, and caused said amended complaint to be served as required by law, in which it was charged that said respondents had been using unfair methods of competition and unfair and deceptive acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act and had been unlawfully discriminating in price among purchasers in commerce within the intent and meaning of Section 2 of the Clayton Act as amended by the Robinson-Patman Act. The respondents herein having filed their respective answers to said amended complaint denying the substantive allegations thereof and asserting their innocence of any violation of law, and said respondents and the Federal Trade Commission being desirous of expediting said proceeding and avoiding the expense incident to the taking of all the necessary testimony and solely for the purpose of this proceeding and any court proceeding for the review or enforcement of any order issued by the Commission herein, and without making any admission of fact for any other purpose whatsoever:

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IT IS HEREBY STIPULATED AND AGREED by and between W. T. Kelley, Chief Counsel for the Federal Trade Commission, and respondents Chain Institute, Inc.; American Chain and Cable Company, Inc.; The Bridgeport Chain & Manufacturing Company; the McKay Company; Pyrene Manufacturing Company; Hodell Chain Company; St. Pierre Chain Corporation; S. G. Taylor Chain Company;

Cleveland Chain & Manufacturing Company; Columbus McKinnon Chain Corporation; International Chain & Manufacturing Company; Nixdorff-Krein Manufacturing Company; Peerless Chain Company; Round California Chain Company; J. M. Russell Manufacturing Company; Seattle Chain & Mfg. Company; Turner & Seymour Manufacturing Company; Western Chain Products Company; Woodhouse Chain Works; and Dennis A. Merriman; Wm. D. Kirkpatrick; Frank A. Bond; George J. Campbell, Jr.; Alfred Peter Shirley, Floyd Bronson Olcott, and Forrest C. Nichols, co-partners, trading as Shirley, Olcott & Nichols, that the stipulation of agreed facts contained herein
2051 may be made and taken as a part of the record herein and may be taken as evidence of facts in this proceeding with the same effect as if evidence to such effect had been adduced and admitted into the record at hearings in the usual course.

STATEMENT OF FACTS

PARAGRAPH THREE: (1) Respondent Chain Institute, Inc., a trade association (sometimes hereinafter referred to as Institute), is a corporation organized and existing under the laws of the State of Delaware, with its principal office at 208 S. LaSalle Street, Chicago, Illinois. Respondent Institute was first organized in June, 1933.

2052 (2) Respondent American Chain & Cable Company, Inc., (sometimes hereinafter referred to as American) is a corporation organized and existing under the laws of the State of New York, with its principal office at Bridgeport, Connecticut. Its general office is at 230 Park Avenue, New York, N. Y. It has a plant located at East Princess and Charles Streets, York Pennsylvania, and a plant at Braddock, Pennsylvania. Respondent American joined the Chain Institute in June, 1933, and has continuously since that time been, and now is, a member of the said Institute.

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(3) The respondent Bridgeport Chain & Manufacturing Company (sometimes hereinafter referred to as Bridgeport) is a Connecticut corporation with its principal office at 964 Crescent Avenue, Bridgeport, Connecticut, and plant at the same location, where, during the period covered by the amended complaint, it manufactured and sold Weldless Chain and sold Welded and Tire Chain.

(4) Respondent The McKay Company (sometimes hereinafter referred to as McKay) is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal office located at McKay Building, Pittsburgh, Pennsylvania. McKay has a plant at York, Pennsylvania, and a plant at McKees Rocks, Pennsylvania. Respondent McKay joined the Chain Institute in June, 1933, and has continuously since that time been, and now is, a member of the said Institute.

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(5) Respondent Pyrene Manufacturing Company (sometimes hereinafter referred to as Pyrene) is a corporation organized and existing under the laws of the State of Delaware, with its principal office located at 560 Blmnt. Avenue, Newark, New Jersey, and plant at Empire Street, Newark, New Jersey, where, during the period covered by the amended complaint, it manufactured and sold Tire Chain. Respondent Pyrene joined the Chain Institute in June, 1933, and has continuously since that time been, and now is, a member of the said Institute.

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(6) Respondent Hodell Chain Company (sometimes hereinafter referred to as Hodell) is a corporation organized and existing under the laws of the State of Ohio. Said respondent was organized in 1886 and until recently traded under the name and title Chain Products Company. Respondent has a plant at Cleveland, Ohio, where, during the period covered by the amended complaint, it manufactured

and sold Welded, Weldless and Tire Chain. Respondent Hodell joined the Chain Institute in 1935, but resigned therefrom in 1939.

(7) Respondent St. Pierre Chain Corporation (sometimes hereinafter referred to as St. Pierre) is a corporation organized and existing under the laws of the State of Massachusetts, with its principal office located in Worcester, Massachusetts, and plant at the same location, where during the period covered by the amended complaint, it manufactured and sold Tire Chain. Respondent St. Pierre joined the Chain Institute in June, 1933, and has continu-
2057 ously since that time been, and now is, a member of the said Institute.

(8) Respondent S. G. Taylor Chain Company (sometimes hereinafter referred to as Taylor) is a corporation organized and existing under the laws of the State of Illinois, with principal office located at 3 141st Street, Hammond, Indiana, and plant at Hammond, Indiana, where during the period covered by the amended complaint it manufactured Welded and Tire Chain and sold Welded, Weldless and Tire Chain. Respondent Taylor joined the Chain Institute in June, 1933, and has continuously since that time been, and now is a member of the said Institute.

(9) Respondent Cleveland Chain & Manufacturing Com-
2058 pany (sometimes hereinafter referred to as Cleveland) is a corporation organized and existing under the laws of the State of Ohio with principal office located at Broadway and Henry Streets, Garfield Heights, Cleveland, Ohio, and plant at the same location, where, during the period covered by the amended complaint, it manufactured and sold Welded, Weldless and Tire Chain. Respondent Cleveland joined the Chain Institute in June, 1933, and has continuously since that time been, and now is, a member of the said Institute.

(10) Respondent Columbus McKinnon Chain Corporation (sometimes hereinafter referred to as Columbus) is a corporation organized and existing under the laws of the State of New York, with principal office located at Tonawanda, New York, and plant at the same location, where, during the period covered by the amended complaint, it manufactured and sold Welded, Weldless and Tire Chain. Respondent Columbus joined the Chain Institute in June, 1933, and has continuously since that time been, and now is, a member of the said Institute.

(11) Respondent International Chain & Manufacturing Company (sometimes hereinafter referred to as International) is a corporation organized and existing under the 2060
laws of the State of Pennsylvania, with principal office located at Norway and Elm, York, Pennsylvania, and plant at the same location, where, during the period covered by the amended complaint, it manufactured and sold Welded, Weldless and Tire Chain. Respondent International joined the Chain Institute in June, 1933, resigned therefrom on June 17, 1939, rejoined on June 15, 1940, and has continuously since the latter date been, and now is, a member of the said Institute.

(12) Respondent Nixdorff-Krein Manufacturing Company (sometimes hereinafter referred to as Nixdorff) is a corporation organized and existing under the laws of the State of Delaware, with principal office located at 900 2061
Howard Street, St. Louis, Missouri, and plant at St. Louis, Missouri, where, during the period covered by the amended complaint, it manufactured and sold Welded and Tire Chain and sold Weldless Chain. Respondent Nixdorff joined the Chain Institute in June, 1933 and has continuously since that time been and now is a member of the said Institute.

(13) Respondent Peerless Chain Company (sometimes hereinafter referred to as Peerless) is a corporation organized and existing under the laws of the State of Minnesota, with its principal office located at Winona, Minnesota, and plant at the same location, where, during the period covered by the amended complaint, it manufactured and sold Welded, Weldless and Tire Chain. Peerless joined the Chain Institute in July, 1933 and has continuously since that time been, and now is, a member of the said Institute.

(14) Respondent Round California Chain Company (sometimes hereinafter referred to as Round) is a corpo-
2063 ration organized and existing under the laws of the State of California, with its principal office located on Bay Shore Highway, South San Francisco, California, and plant at the same location, where, during the period covered by the amended complaint, it manufactured and sold Welded Chain and sold Weldless and Tire Chain.

(15) Respondent J. M. Russell Manufacturing Company (sometimes hereinafter referred to as Russell) is a corporation organized and existing under the laws of the State of Connecticut with its principal office located at Naugatuck, Connecticut, and plant at the same location, where during the period covered by the amended complaint, it manufactured and sold the type of Weldless Chain known as Sash and Kindred Chain. Respondent Russell joined the Sash
2064 and Kindred Chain Manufacturers Division of the Chain Institute in July, 1933, and has continuously since that time been, and now is, a member of the said Group.

(16) Respondent Seattle Chain & Mfg. Company (sometimes hereinafter referred to as Seattle) is a corporation organized and existing under the laws of the State of Washington, with principal office at 6921 East Marginal Way, Seattle, Washington, and plant at the same location.

where during the period covered by the amended complaint, it manufactured and sold Welded Chain and sold Weldless and Tire Chain.

(17) Respondent Turner & Seymour Manufacturing Company (sometimes hereinafter referred to as Turner) is a corporation organized and existing under the laws of the State of Connecticut with principal office at Torrington, Connecticut, and plant at the same location, where, during the period covered by the amended complaint, it manufactured and sold the type of Weldless Chain known as Sash and Kindred Chains. Respondent Turner joined the Sash and Kindred Chain Group of the Weldless Chain Manufacturers Division of the Chain Institute in July, 1933, and 2066
has continuously since that time been, and now is, a member of the said Group.

(18) Respondent Western Chain Products Company (sometimes hereinafter referred to as Western) is a corporation organized and existing under the laws of the State of Illinois, with its principal office located at 1807 West Belmont Avenue, Chicago, Illinois, and plant at the same location, where, during the period covered by the amended complaint, it manufactured and sold Welded, Weldless and Tire Chain. Respondent Western joined the Chain Institute in July, 1933, and has continuously since that time been, and now is, a member of the said Institute.

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(19) Respondent Woodhouse Chain Works (sometimes hereinafter referred to as Woodhouse) is a corporation organized and existing under the laws of the State of New Jersey, with principal office at 251 Third Street, Trenton, New Jersey, and plant at the same location, where, during the period covered by the amended complaint, it manufactured and sold Welded Chain and sold Weldless and Tire Chain. Respondent Woodhouse joined the Chain Institute

in June, 1933, and has continuously since that time been, and now is, a member of the said Institute.

(20) Respondent Dennis A. Merriman, an individual (sometimes hereinafter referred to as Merriman) is Managing Director of Respondent Institute with office located at 208 South LaSalle Street, Chicago, Illinois.

(21) Respondent Walter S. McCann, an individual (sometimes hereinafter referred to as McCann) was Secretary & Treasurer of Respondent Institute, during part of the period covered by the amended complaint, with office located at 208 South LaSalle Street, Chicago, Illinois.
2069 McCann died on May 19, 1945.

(22) Respondent Wm. D. Kirkpatrick, an individual (sometimes hereinafter referred to as Kirkpatrick) is Vice President of respondent American, and from November, 1942, to November, 1944, was president of Respondent Institute. His office is located at the office of Respondent American at York, Pennsylvania. Since June, 1938, he has represented respondent American in its membership in respondent Institute and as such representative of respondent American has attended meetings of representatives of other members, and in that capacity served on committees of Respondent Institute, wrote and otherwise communicated with other representatives of members of
2070 Respondent Institute concerning action of the Institute, its officials and members.

(23) Respondent Frank A. Bond, an individual (sometimes hereinafter referred to as Bond) is Executive Vice President and Secretary of respondent McKay, with office located at McKay Building, Pittsburgh, Pennsylvania. Since 1933 he has represented respondent McKay in its membership in respondent Institute and as such repre-

sentative of McKay has attended meetings of representatives of other members, and in that capacity served on committees of respondent Institute, wrote and otherwise communicated with other representatives of members of respondent Institute concerning action of the Institute, its officials and members. He served from June, 1933 to date as Chairman of the Traffic Committee of the Chain Institute in dealing with freight rate matters.

(24) Respondent George J. Campbell, Jr., an individual (sometimes hereinafter referred to as Campbell) has been President of respondent International since September, 1941, with offices located at the principal place of business of respondent International in York, Pennsylvania. From 2072
November, 1942, to November, 1944, he served as vice-president of respondent Institute. Since September, 1941, he has represented respondent International in its membership in respondent Institute and as such representative of respondent International has attended meetings of representatives of other members, and in that capacity served on committees of respondent Institute, wrote and otherwise communicated with other representatives of members of respondent Institute concerning action of the Institute, its officials and members. George J. Campbell, Sr., was president of respondent International from 1922 to September 9, 1941, when he died. From June 19, 1933, to June 17, 1939, and from June 15, 1940, to September 9, 1941, he represented respondent International and its membership 2073
in respondent Institute and as such representative of respondent International attended meetings of representatives of other members, and in that capacity served on committees of respondent Institute, wrote and otherwise communicated with other representatives of members of respondent Institute concerning action of the Institute, its officials and members.

(25) Respondent Alfred Peter Shirley (sometimes hereinafter referred to as Shirley) is an individual, a resident of Punta Gordo, Florida, who is an engineer and manufacturers' sales representative and is a partner in the firm of Shirley, Olcott & Nichols, which maintains its offices in the Mills Building, Washington, D. C.

(26) Respondent Floyd B. Olcott (sometimes hereinafter referred to as Olcott) is an individual who resides at 7828 Orchid Street, N.W., Washington, D. C., who is an engineer and manufacturers' sales representative and is a partner in the firm of Shirley, Olcott & Nichols, which maintains
2075 its offices in the Mills Building, Washington, D. C.

(27) Respondent Forrest C. Nichols (sometimes hereinafter referred to as Nichols) is an individual who resides at 4702 Quebec Place, Washington, D. C., and who is an engineer and manufacturers' sales representative and is a partner in the firm of Shirley, Olcott & Nichols, which maintains its offices in the Mills Building, Washington, D. C.

Respondents Cleveland, Seattle, Round and Bridgeport are affiliated through common ownership of the controlling capital stock of each of said respective corporations. L. D. Cull is Chairman of the board of directors of each of said four corporations. Through its representation of
2076 respondent Cleveland in its membership in respondent Institute, he also represented respondents Seattle, Round and Bridgeport, and their interests, at meetings of members of the respondent Institute and in other activities of the Institute.

Each of the Respondents described in sub-paragraphs (2) to (19), inclusive, of this paragraph is now, and was during the period covered by the amended complaint, engaged in the manufacture and sale of chain and chain

parts, and such respondents are sometimes hereinafter referred to as Respondent Manufacturers.

PARAGRAPH FOUR: Respondent Manufacturers produce various types of steel, alloy-steel and other metallic chain and chain parts. The principal types of chain involved are Welded Chain, Weldless Chain and Tire Chain.

Welded Chain is so designated because each link is closed and sealed through welding. It includes chain of various sizes and weights for many uses, such as Anchor Chains, Log Chains, Tie Chains (for securing dairy cows at stanchions), Tie-Out Chains (for use in securing cows and other animals for grazing, etc.) and Trace Chains (for harnessing 2078
teams and for other agricultural uses). Since the development of the art of electric welding, the welded chain industry has used it for mass production of Welded Chain. In the trade, most Welded Chain is also referred to as Commercial Chain and Pound Chain. Such Welded Chain is priced by the manufacturers on a per pound basis.

Weldless Chain is for the most part light in weight and in general is used where the stronger chain is not required. Weldless Chain is classified by the trade into two principal types: (1) Ordinary Weldless Chain, which is made by bending wire into the form of links and knotting rather than welding it; this type of Weldless Chain is used as cow ties, porch swing chain, well chain, dog leads, animal trap chains, and for many other purposes; (2) Sash and 2079
Kindred Chains, which are made by stamping or cutting the links from flat metal strip stock; this type of Weldless Chain is used as window sash chains, transom chains, furnace chains, ships' telegraph chain, and for many other purposes.

Tire Chains are made by the welding process but are so linked as to form two line chains connected by cross chains at equal distances so that they may be attached

around the wheels of motorized equipment, including automobiles, trucks and farm tractors.

Respondent Manufacturers in the course and conduct of their business manufacture, sell and distribute practically all the Welded Chain, Weldless Chain and Tire Chains produced in the United States. The said Respondent Manufacturers sell such products at various points throughout the United States to Wholesalers, dealers and consumers, including the United States Government, and when sales are made Respondent Manufacturers have regularly shipped and do ship said products to the purchasers at points in the several states of the United States and the
2081 District of Columbia other than in the States of origin of the shipments. They are engaged in commerce in selling and shipping said products within the meaning of the term "commerce" as defined in the Federal Trade Commission Act and the Clayton Act.

PARAGRAPH FIVE: (2) Respondents American, McKay, Pyrene, St. Pierre, Taylor, Cleveland, Columbus, International, Nixdorff and Woodhouse organized Respondent Institute in June, 1933. Respondent Members have operated, and now operate, Respondent Institute as an incorporated trade association to promote and serve their mutual interests. See Paragraph THREE for the periods during which the respective respondents were members of the Institute.
2082

(3) Respondent Members employed Respondent Merriman, on or about August 1, 1938, as Managing Director of Respondent Institute, and he has served in that capacity since that date.

(4) Respondent Manufacturers have adopted and used delivered pricing methods as described in Paragraphs NINE, TEN and ELEVEN hereof, and published list prices

2083

of the various Respondent Manufacturers have for substantial periods of time been identical to customers located at any particular place in the United States.

(8-a) To enable its members to compute the delivered price quotations for their products, as more fully described in Paragraph NINE hereof, Respondent Institute in 1933 employed one Charles Donley, a freight rate expert, to compile freight rates relating to Welded Chain from Pittsburgh, Pennsylvania to destinations throughout the United States and to revise the same from time to time. The compilation thus cooperatively and collectively compiled and disseminated between and among Respondent Members is not intended to serve any need for freight rates for shipping purposes but is designed for their use in pricing as aforesaid and is so used.

2084

These freight factors are not, and do not purport to be, the actual or official freight rates from the points from which the respondents make shipments of Welded Chain. They do not reflect, or purport to reflect, the rates which would apply from Pittsburgh to the various destinations listed in the compilation over all routes.

"Mr. Kittelle: * * * Now, these 'freight factors' (included in the Donley freight rate book) did not purport to be the actual from points at which the respondents shipped. That is right, they shipped from York and places other than Pittsburgh, and most of them, the big ones at least, had their own traffic departments.

2085

"Trial Examiner Ballinger: Mr. Steinhauer, is that your understanding of this language?

"Mr. Steinhauer: No, sir. They put out these books for the purpose of pricing.

"Mr. Kittelle: I said that.

"Mr. Steinhauer: All right, and I have no doubt they tried to get the exact rates.

"Trial Examiner Ballinger: • • • the stipulation as I see it is ambiguous and I want to see if I can get an agreement between counsel here as to exactly what it means.

"Mr. Kittelle: All right, Mr. Examiner. • • • The Donley freight book which is in evidence as an exhibit contains freight rates by rail LCL and carload and also in some instances by rail and water from Pittsburgh to a large number of destinations shown in that book. Do you follow along so far?

"Mr. Steinhauer: All right.

"Mr. Kittelle: Now, the way the book was used
2087 is this. If a manufacturer at York makes a sale to a buyer, let us say, in Springfield, Massachusetts, and let us suppose the price is one dollar on this sale, he charges the buyer that dollar and the buyer pays the railroad the freight from York, the factory, to Springfield, Massachusetts, the destination.

"And then let us assume that the freight from Pittsburgh to Springfield, Massachusetts, the destination, would be a little bigger or a little greater than what the customer paid the railroad. The invoice would show the price of one dollar; it would show the freight that the customer had paid from York to Springfield, and let us suppose that is 25 cents. It would show the freight from Pittsburgh to Springfield, and let us suppose that is 27 cents. They would charge the buyer
2088 the difference, 2 cents.

"Now, here is where the Donley book comes in. When they write down the freight from York, Pennsylvania, to Springfield, Massachusetts, they don't need the Donley book. That is the actual freight for shipping purposes. When they show the freight from Pittsburgh to Springfield, Massachusetts, for the purposes of this price adjustment, then they take out the Donley book and if Springfield is there as a destination, as

there is no doubt it is, that would give them the rate. Is that satisfactory so far?

"Mr. Steinhauer: That is right.

"• • • •

"Trial Examiner Ballinger: I understood from reading it that the book is used for both freight rates and for pricing.

"Mr. Kittelle: When they say 'used for pricing purposes,' they meant merely in figuring this little allowance.

"Trial Examiner Ballinger: As I understand it now, it is perfectly clear; but it wasn't clear prior to the explanation" (2770-2773). 2090

(9) Respondent American has for more than 25 years been the most important factor in the chain industry in this country. It was one of the first respondent manufacturers to enter the field and is the largest manufacturer of most of the types of chain described herein. It has been a leader in announcing quotations of prices on the types of chain and chain products described herein. Other respondent manufacturers have adopted and quoted as their own prices identical with those announced by American and have followed such quotations of American for substantial periods of time in connection with interstate sales and shipments of chain and chain products. Although during such periods of time they did make price quotations (including the base price and other price factors, including basic and other discounts, and the various terms of sale) identical with those made by American, at other times there has been substantial variation in such quoted prices. At times when the prices quoted by American and the other respondent manufacturers were identical some sales were being made to customers at some locations by at least some of the respondent manufacturers at different prices from those shown on the quotations. 2091

2092 *Stipulation as to Certain Basic Background Facts.*

PARAGRAPH SIX: Respondent American, originally known as Weed Chain Tire Grip Company, was the original manufacturer of tire chains in this country and was the owner of the following controlling patents on tire chains. Parsons No. 723,299, March 24, 1903, and Weed No. 768,495, August 23, 1904, the validity and infringement of which were established by decisions of the federal courts. After 1921, when the aforesaid patents expired, other chain companies entered upon the manufacture and sale of tire chains but respondent American remained a prominent factor in the manufacture and sale of tire chains and continued to be generally recognized by other manufacturers as the leader
2093 in the industry.

Toward the end of the 1920's respondent American acquired ownership and control over patented inventions covering improvements in tire chains. The improvements are generally described as bar reinforced anti-skid devices. Some such improvements are covered by letters patent Beckwith No. 1,536,556, May 5, 1925; Reyburn No. 1,696,255, December 25, 1928; Conner No. 2,180,101, November 14, 1930. Other patents controlled by respondent American cover several forms of reinforced anti-skid links for tire chains. Anti-skid reinforced links are made a part of the tread members in the cross chains of tire chains with the reinforcements usually in the form of a diagonally extending bar or other such device on the contact points of the
2094 tread members' links which are the points subjected to the greatest wear.

American entered into agreements with McKay, Pyrene, Hodell, St. Pierre and S. G. Taylor, all relating to tire chains embodying the anti-skid bar reinforced link feature covered by said patents. For certainty as to the dates of said agreements, and the terms thereof, reference is made to the agreements themselves, which are admissible in evidence under the terms of this stipulation. The agree-

ment with McKay was terminated by the latter on February 6, 1939 as provided for in said agreement. Said agreements provided that the said licensee manufacturers at their option might either manufacture their own bar reinforced links or have the same manufactured for them by American, which latter practice was followed by all of the licensees except McKay. The bar reinforced tread chain members that were supplied by American were in rough, unfinished form; they were unhardened, unpolished and unplated and consisted simply in short lengths of three or four reinforced treated links without end-connecting hooks. Before the links so supplied could be adapted to any useful purpose, extensive work and processing was required on the part of the licensee, including hardening by special heat treatment, tumbling, polishing and plating the cross links; fitting and adding special cross chain hooks adapted to connect the cross chains with the side members into an anti-skid tire chain. 2096

These cross members had then to be attached to rust-resistant side chains, the ends of which had to be supplied with special end-connecting hooks. These several steps were performed by the licensee, who, after receiving the rough untreated chain members, heat treated and hardened them; tumbled and polished them; plated them; added special end-hooks and connected the same to side members made or supplied by the licensee, the special end-connecting hooks for the side chains were also supplied and attached by the licensee. All these several steps were performed by the licensee at its plant and all of these parts except the rough untreated tread chain members were made or supplied by licensee; and all the component parts were assembled by licensee at its plant into completed anti-skid chain devices. Said agreements with American also contained the provision whereby the said licensees were required to observe minimum prices and discounts in selling chains covered by the licenses, which provision, however, 2097

was cancelled and released by American in December, 1942, prior to the filing of the complaint herein.

PARAGRAPH SEVEN: Each of the respondents American, McKay, Pyrene and Hodell entered into an arrangement during 1937 with respondents Shirley, Olcott and Nichols, copartners trading under the firm name Shirley, Olcott and Nichols (sometimes hereinafter referred to merely as respondent Shirley) pursuant to the terms and provisions of which it was provided as follows:

(a) Respondent Shirley were to act as manufacturers' sales representatives in the sale of tire chains manufactured
2099 by respondents American, McKay, Pyrene and Hodell;

(b) Respondent Shirley were to receive orders for said chains; to enter such orders on their books; to make out on their own form an order for each such order for chain; to select one of said respondent Manufacturers to fill and ship said order; to forward their order form to such selected manufacturer; after receipt by them of such manufacturer's invoice made out to them, to prepare and send their own invoice to the purchaser of the chains; to receive payment of their invoice and then to remit to the manufacturer their check for the amount of the payment less a deduction of 7½% of the payment, such percentage being retained by respondent Shirley as their profit on the transaction;

2100 (c) Respondent Shirley were to endeavor to sell, under the above stated plan, tire chains embodying the patented anti-skid bar reinforced feature to various agencies of the Federal Government through the Procurement Division of the Treasury Department, as well as to others.

Respondents St. Pierre and Taylor became parties to said arrangement in respect of sales of said chains to the Federal Government commencing January 1, 1940. Re-

spondent McKay withdrew from said arrangement on June 30, 1940, and thereafter had no dealings with respondent Shirley. Pursuant to said arrangement and in response to advertisements for bids issued by the Procurement Division, respondent Shirley, from time to time during the years 1937 to 1942, inclusive, submitted bids on tire chains embodying the aforesaid patented anti-skid bar reinforced feature. Such bids were submitted in the name of respondent Shirley. After contracts were awarded respondent Shirley, the federal agencies for whom such contracts were let submitted orders direct to respondent Shirley.

This arrangement was accepted by officials of the Procurement Division. 2102

During the period of the first contract entered into by respondent Shirley with the Procurement Division in 1937, government agencies sent to respondent Shirley orders for unpatented tire chains, as well as tire chains embodying the patented reinforced links. As a result, it was necessary for respondent Shirley to write to the agencies submitting such orders that it had no contract for the supplying of the standard, unpatented tire chains. It was suggested by the Procurement Division to Shirley that the arrangement be extended to cover the unpatented type of tire chains. The aforesaid respondent manufacturers American, McKay, Pyrene and Hodell extended their arrangement with respondent Shirley to cover all types of tire chains manufactured by them. During the years 1939 to 1942, inclusive, respondent Shirley handled unpatented tire chains in the same manner as they had previously handled the tire chains embodying the patented anti-skid bar reinforced feature. 2103

During the time that said arrangement with respondent Shirley was in effect the said respondent Manufacturers whose chains respondent Shirley were then handling and other respondent Manufacturers submitted bids from time

to time directly to the Government on Procurement Division contracts, covering either unpatented or patented reinforced tire chains, or both, and some were in many instances awarded contracts, to wit, respondents Cleveland, Columbus, International and McKay.

The arrangement with respondent Shirley was terminated by each of the respondent Manufacturers then a party thereto on October 15, 1942, after a conference with officials of the Federal Trade Commission. Notice of such termination was given to the Commission prior to the issuance of the original complaint in this proceeding.

2105 PARAGRAPH EIGHT: With respect to the type or types of chain it manufactures and/or sells, each respondent Member, with the knowledge that other respondent Members simultaneously do likewise, uses the applicable basing point, multiple basing point, and/or delivered pricing practices and methods hereinafter more fully described in PARAGRAPHS NINE, TEN and ELEVEN hereof.

PARAGRAPH NINE: For the period from about 1900 to date, practically all welded chain sold in the United States by each manufacturer thereof has been quoted on the basis of delivered prices, computed by adding to a basic price f.o.b. manufacturer's plant an amount equal to the rail freight applicable to such shipment from Pittsburgh, Pennsylvania, to the point of delivery, irrespective of the
2106 point from which shipment is actually made. This method of computing and quoting delivered prices for welded chain was first adopted by other chain manufacturers before any of the respondent Manufacturers entered the industry. The original manufacturers of welded chain were led to adopt said method of pricing by the use of the same method by the basic steel industry from which they procured their requirements of steel rod used in the manufacture of welded chain. As a result of the long-established use of this

method of pricing by other manufacturers, each respondent Manufacturer adopted the same method when he entered the field. Each respondent Manufacturer, engaged in the manufacture or sale of welded chain, as a general practice, now sells, and during the period covered by the amended complaint has sold, such chain on a basis in accordance with delivered price quotations computed in the manner set forth hereinabove. Since June, 1945, respondent Taylor has not sold any chain on this basis.

PARAGRAPH TEN: For the period from about 1900 to date practically all weldless chain sold in the United States by each manufacturer thereof has been quoted on the basis of a delivered price, computed by adding to a basic price 2108
f.o.b. the manufacturer's plant an amount equal to the rail freight applicable to such shipment to the point of delivery from either York, Pennsylvania; Cleveland, Ohio; Cincinnati, Ohio; or Bridgeport, Connecticut, whichever point is located closest freightwise to the point of delivery, irrespective of the point from which shipment is actually made. This method of computing and quoting delivered prices was first adopted when the four points mentioned herein were the only points in the United States at which weldless chain was manufactured, and was in effect prior to the time that any of the respondent Manufacturers entered the field. At the present time approximately 75% of the weldless chain sold in the United States is manufactured at those four points. Although there are a few 2109
variations from the practice described herein as to certain respondents, certain products and certain areas, each respondent Manufacturer, engaged in the manufacture or sale of weldless chain, as a general practice, now sells, and has during the period covered by the amended complaint sold, such chain in accordance with the delivered price quoting basis computed in the manner set forth hereinabove.

PARAGRAPH ELEVEN: For the period from about 1904 to date, practically all tire chains sold in the United States by each of the manufacturers thereof have been quoted on the basis of f.o.b. mill prices, which are uniform among customers of such manufacturer throughout the United States, with full freight allowed from the place of shipment to destination, irrespective of the point at which delivery is made. The practice of selling tire chains on said basis was first adopted by American when it entered upon the manufacture of tire chains in 1904 in order to properly publicize and popularize tire chains throughout the United States, as a new product. Upon expiration of American's
2111 patents in 1921, other manufacturers, including certain of respondent Manufacturers, entered the field and adopted the same method of pricing which has been thus long established. Each respondent Manufacturer, engaged in the manufacture or sale of tire chains, as a general practice, now sells, and during the period covered by the amended complaint has sold, tire chains on the basis hereinabove described.

IT IS FURTHER STIPULATED AND AGREED that the parties waive any and all objections to the introduction of the documents heretofore identified as Commission's exhibits and described in the transcript of hearings heretofore had in this proceeding; that the parties waive any and all objections to the introduction of the documents described in
2112 Appendix "A" annexed to and made part of this stipulation; that the parties respondents and the Commission reserve the right to introduce additional evidence, both documentary and parol; that the Commission may proceed upon the record herein, this stipulation of evidence, such documentary and parol evidence as may be introduced in this proceeding, to make its report, stating its findings as to the facts (including reasonable inferences which it may draw from this stipulation and such evidence) and its con-

clusions thereon, with the right reserved to the parties to file exceptions to any report of the Trial Examiner and to make oral argument and file written briefs before the Trial Examiner and the Commission. The stipulations and other portions of the record heretofore constituted under the original complaint herein may be taken by the Commission with the same force and effect as if the same had been entered into and constituted as a part of the record under the amended complaint herein.

Dated this 15th day of July, A. D. 1946.

FEDERAL TRADE COMMISSION
By /s/ W. T. Kelley, Chief Counsel 2114

CHAIN INSTITUTE, INC.
By /s/ Clarence M. Dinkins

AMERICAN CHAIN & CABLE COMPANY, INC.
By /s/ Frederick S. Duncan

THE BRIDGEPORT CHAIN & MANUFACTURING COMPANY
By /s/ Sumner S. Kittelle

THE McKAY COMPANY
By /s/ Charles Denby

PYRENE MANUFACTURING COMPANY
By /s/ Charles P. G. Fuller 2115

HODELL CHAIN COMPANY
By .....*

* A separate but identical stipulation, dated July 23, 1946 was entered into between the Federal Trade Commission, per W. T. Kelley, Chief Counsel, and Hodell Chain Company, per C. W. Sellers.

ST. PIERRE CHAIN CORPORATION
By /s/ Frederick S. Duncan

S. G. TAYLOR CHAIN COMPANY
By /s James E. S. Baker

CLEVELAND CHAIN & MANUFACTURING COMPANY
By /s/ Sumner S. Kittelle

COLUMBUS McKINNON CHAIN CORPORATION
By .....**

INTERNATIONAL CHAIN & MANUFACTURING COMPANY
2117 By /s/ Frederick B. Gerber

NIXDORFF-KREIN MANUFACTURING COMPANY
By /s/ Sidney Levy

PEERLESS CHAIN COMPANY
By /s/ Sidney Levy

ROUND CALIFORNIA CHAIN COMPANY
By /s Sumner S. Kittelle

J. M. RUSSELL MANUFACTURING COMPANY
By /s Norman King Parsells

SEATTLE CHAIN & MFG. COMPANY
2118 By /s/ Sumner S. Kittelle

TURNER & SEYMOUR MANUFACTURING COMPANY
By /s/ Norman King Parsells

WESTERN CHAIN PRODUCTS COMPANY
By /s/ Sidney Levy

** This stipulation was not signed by Columbus McKinnon Chain Corporation.

WOODHOUSE CHAIN WORKS
By /s/ Sidney Levy

DENNIS A. MERRIMAN
By /s/ Sidney Levy

WM. D. KIRKPATRICK
By /s/ Frederick S. Duncan

FRANK A. BOND
By /s/ Charles Denby

GEORGE J. CAMPBELL, JR.
By /s/ Frederick B. Gerber 2120
/s/ Clarence M. Dinkins

ALFRED PETER SHIRLEY
By /s/ H. Stewart McDonald

FLOYD BRONSON OLCOTT
By /s/ H. Stewart McDonald

FORREST C. NICHOLS
By /s/ H. Stewart McDonald

(The foregoing stipulation appears at pages 596 to 626, inclusive, of the transcript of hearings before the Federal Trade Commission.)

2121

2122

Stipulation as to Certain Facts Regarding Turner & Seymour Manufacturing Company.

IT IS HEREBY STIPULATED AND AGREED, by and between W. T. Kelley, Chief Counsel for the Federal Trade Commission, and Respondent, Turner and Seymour Manufacturing Company (hereinafter referred to as Turner) that the agreed facts contained in the foregoing Stipulation of Agreed Facts may be made and taken as a part of the record herein and may be taken as facts in this proceeding, with the same effect as if evidence to such had been adduced and admitted into the record at hearings in the usual course except that Sub-Paragraph (4) of PARAGRAPH FIVE, PARA-
2123 GRAPH EIGHT and PARAGRAPH TEN of said Stipulation do not contain a true description of the pricing practices and methods followed by Turner, in the sale of Sash and Kindred Chain, but it is hereby stipulated and agreed that the following is a true description of the pricing practices and methods followed by Turner, as shown by its invoices:

It sold all chains except Cable Chain, Laminated Sprocket Chain and Universal Chain, in the following manner:

(1) It charged a base price F.O.B. Torrington, Connecticut, the location of its only mill.

(2) On sales to customers in Torrington and on sales where customers picked up the chain at the mill, the base
2124 price was charged and there was no charge for transportation.

(3) On sales to customers located closer to Torrington than to Bridgeport, the customer paid the base price F.O.B. Torrington, plus the actual transportation charge from the mill to the point of delivery.

Stipulation as to Certain Facts Regarding Turner & Seymour Manufacturing Company. 2125

(4) On all shipments of one hundred pounds or less, the base price F.O.B. Torrington was charged and the customer paid the actual transportation charge from the mill to the point of delivery.

(5) On shipments in excess of One hundred pounds, where the transportation charge from Torrington to the customer's destination was greater than the transportation charge from Bridgeport, York or Cleveland and, in the case of Furnace and Register Chain, from Holland, Michigan, also, (whichever city was closest freightwise to the destination of the customers involved) to the customer's 2126
destination, the customer was charged the base price F.O.B. Torrington and the transportation charge was handled in one of the following ways:

(a) If the shipment was made F.O.B. Torrington, the customer was given a credit on the invoice for the difference between the two transportation charges.

(b) If the shipment was made freight prepaid, the transportation charge from that one of the aforementioned cities which was closest to the customer's destination was added to the base price on the invoice.

(6) On deliveries in any of the five boroughs of New York City, in Newark, in Jersey City and Hoboken there was no charge for transportation. 2127

(7) On shipments from its warehouses in Chicago, St. Louis and Philadelphia, Turner charged a base price F.O.B. the warehouse and granted similar allowance or made similar charges to equalize the actual transportation from Bridgeport, York, Cleveland or Holland, whichever was closest freightwise to the customer's destination.

2128 *Stipulation as to Certain Facts Regarding Turner & Seymour Manufacturing Company.*

(8) In all cases where the minimum bill of lading charge was higher than the amount of freight equalization, on the shipment involved, freight equalization was not used.

(9) In no case was any amount charged for transportation in excess of the actual cost of transportation from Torrington to the point of delivery.

All sales of Cable Chain, Laminated Sprocket Chain and Universal Chain was made F.O.B. Torrington and the customer paid the transportation charge without equalization or allowance.

2129

Dated this 15th day of July, 1946.

FEDERAL TRADE COMMISSION

By s/ W. T. Kelley
W. T. Kelley
Chief Counsel

TURNER AND SEYMOUR MANUFACTURING COMPANY

By s/ Norman King Parsells
Its Attorney

(The foregoing stipulation appears at pages 634 to 637, inclusive, of the transcript of hearings before the Federal Trade Commission.)

2130

2131

Stipulation as to Certain Facts Regarding John M. Russell Mfg. Co.

IT IS HEREBY STIPULATED AND AGREED, by and between W. T. Kelley, Chief Counsel for the Federal Trade Commission, and Respondent, John M. Russell Manufacturing Company (hereinafter referred to as Russell) that the agreed facts contained in the foregoing Stipulation of Agreed Facts may be made and taken as a part of the record herein and may be taken as facts in this proceeding, with the same effect as if evidence to such had been adduced and admitted into the record at hearings in the usual course except that Sub-Paragraph (4) of PARAGRAPH FIVE, PARAGRAPH EIGHT and PARAGRAPH TEN of said Stipulation do not contain a true description of the pricing practices and methods followed by Russell in the sale of Sash and Kindred Chain, but it is hereby stipulated and agreed that the following is a true description of the pricing practices and methods followed by Russell, as shown by its invoices:

2132

It sold all chains except Cable Chain, Laminated Sprocket Chain and Universal Chain, in the following manner:

(1) It charged a base price F.O.B. Naugatuck, Connecticut, the location of its only mill.

(2) On sales to customers in Naugatuck and on sales where customers picked up the chain at the mill, the base price was charged and there was no charge for transportation.

2133

(3) On sales to customers located closer to Naugatuck than to Bridgeport, the customer paid the base price F.O.B. Naugatuck, plus the actual transportation charge from the mill to the point of delivery.

(4) On all shipments of one hundred pounds or less, the base price F.O.B. Naugatuck was charged and the

2134 *Stipulation as to Certain Facts Regarding John M. Russell Mfg. Co.*

customer paid the actual transportation charge from the mill to the point of delivery.

(5) On shipments in excess of One hundred pounds, where the transportation charge from Naugatuck to the customer's destination was greater than the transportation charge from Bridgeport, York or Cleveland and, in the case of Furnace and Register Chain, from Holland, Michigan, also, (whichever city was closest freightwise to the destination of the customers involved) to the customer's destination, the customer was charged the base price F.O.B.
2135 Naugatuck and the transportation charge was handled in one of the following ways:

(a) If the shipment was made F.O.B. Naugatuck, the customer was given a credit on the invoice for the difference between the two transportation charges.

(b) If the shipment was made freight prepaid, the transportation charge from that one of the aforementioned cities which was closest to the customer's destination was added to the base price on the invoice.

(6) On deliveries in any of the five boroughs of New York City, in Newark, in Jersey City and Hoboken there was no charge for transportation.

2136 (7) In all cases where the minimum bill of lading charge was higher than the amount of freight equalization, on the shipment involved, freight equalization was not used.

(8) In no case was any amount charged for transportation in excess of the actual cost of transportation from Naugatuck to the point of delivery.

All sales of Cable Chain, Laminated Sprocket Chain and Universal Chain were made F.O.B. Naugatuck and the cus-

tomer paid the transportation charge without equalization or allowance.

Dated this 15th day of July, 1946.

FEDERAL TRADE COMMISSION

By /s/ W. T. Kelley
W. T. Kelley
Chief Counsel

JOHN M. RUSSELL MANUFACTURING COMPANY

By /s/ Norman King Parsells 2138
Its Attorney

(The foregoing stipulation appears at pages 639 to 642, inclusive, of the transcript of hearings before the Federal Trade Commission.)

2140

Stipulation Regarding Columbus McKinnon Chain Corporation

In the Matter of Chain Institute, et al.

IT IS HEREBY STIPULATED by the respondent Columbus McKinnon Chain Corporation through its undersigned counsel that duly qualified witnesses who are representatives of those respondents who signed the stipulation appearing at pages 596 through 626, inclusive, of the transcript herein,* if called as witnesses in this case, after being sworn, would testify to the same effect of the language that appears in the record of the transcript herein beginning at line 4, page 599 through line 18, page 619, inclusive,**
2141 and line 1, page 620, through line 18, page 622, inclusive;*** and it is further stipulated that the record may be taken with the same force and effect as if such witnesses had appeared and so testified.

Dated at Washington, D. C., this the 19th day of August, 1946

COLUMBUS MCKINNON CHAIN CORPORATION

By s/ FINCK & HUBER
s/ Elmer E. Finck
of Counsel

(The foregoing stipulation appears at pages 742 and 743 of the transcript of hearings before the Federal Trade
2142 Commission.)

* The Stipulation appearing *supra*, pp. 683 to 707, inclusive.

** From the heading "STATEMENT OF FACTS," *supra*, p. 684, to but not including PARAGRAPH EIGHT, *supra*, p. 702.

*** PARAGRAPH NINE, *supra*, p. 702, through PARAGRAPH ELEVEN, ending on page 704, *supra*.

2143

Stipulation as to Certain Facts Regarding Invoices and Prices.

The respondent manufacturers in the above-entitled action, having heretofore, at the request of the attorneys supporting the complaint herein, furnished to said attorneys for study copies of all of their respective invoices for chain and chain products sold during the month of October, 1941, and said attorneys supporting the complaint having caused a partial study to be made of said invoices with the assistance of attorneys for said respondent manufacturers, and it appearing that it would require the expenditure of a disproportionate amount of time and money on the part of said attorneys supporting the complaint and also on the part of the respondents and their attorneys in order 2144
to develop all of the facts concerning the pricing methods used by the respective respondents not only during said month of October, 1941, but also during other periods of time which might be claimed by the attorneys supporting the complaint or the respondents to be more representative of the use of said pricing methods, and the parties to this proceeding being desirous of expediting the same and avoiding the expense and time incident to any further study of invoices or incident to the taking of testimony on the question of the pricing methods of the respective respondent manufacturers, and solely for the purpose of this proceeding and any court proceeding for the review or enforcement of any order issued by the Commission herein, and without making any admission of fact for any other pur- 2145
pose whatsoever:

IT IS HEREBY STIPULATED AND AGREED by and between counsel supporting the complaint herein and counsel for the respondent manufacturers herein:

1. That the invoices introduced in evidence herein as Commission's Exhibits Nos. 1568 to 1570, both inclusive, demonstrate the manner, form and substance of respond-

2146 *Stipulation as to Certain Facts Regarding Invoices and Prices.*

ents' practices in making sales of their welded chain and welded chain products during the period covered by the complaint herein, such sales having been made in accordance with respondents' method of quoting prices arrived at by each of said respondents using, as it did, its published list price, its published discounts therefrom, and its published list extras thereon, as to each said product, which were the same as were published at the time by all other respondents selling such product, and charging the customer with the amount by which the actual transportation charge paid by the customer to the carrier was less than
2147 the all-rail transportation charge on such product from Pittsburgh, Pennsylvania, to the destination involved, or crediting the customer with the amount by which such actual transportation charge paid by the customer was greater than such all-rail transportation charge from Pittsburgh, Pennsylvania, to such destination, except that small shipments were sold f.o.b. mill with no freight allowed or prepaid.

2. That the invoices introduced in evidence herein as Commission's Exhibits Nos. 1571 to 1573, both inclusive, demonstrate the manner, form and substance of respondents' practices in making sales of their weldless chain and weldless chain products during the period covered by the complaint herein, such sales having been made in accord-
2148 ance with respondents' method of quoting prices arrived at by each of the said respondents using, as it did, its published list prices, its published discounts therefrom, and its published list extras thereon, as to each said product, which were the same as were published at the time by all other respondents selling such product, such quotations being made f.o.b. manufacturer's plant, freight equalized with either York, Pennsylvania, Cleveland, Ohio, Cincinnati, Ohio, Bridgeport, Connecticut, or, in the case of furnace

2149

chain, Holland, Michigan; that is, in the event that the transportation charge from respondent manufacturer's plant to destination, paid by the buyer, was greater than what such transportation charge would have been on such products from either said York, Cleveland, Cincinnati, Bridgeport, or (on furnace chain) Holland, whichever of said points was nearest freightwise to the customer's destination, respondents made an allowance to the buyer in the amount of such excess; *provided, however,* that small shipments were sold f.o.b. mill with no freight allowed or prepaid; *and, provided, further,* that notwithstanding anything heretofore or hereafter contained in this stipulation, 2150
the methods of selling used and followed by respondents Turner & Seymour Manufacturing Company and J. M. Russell Manufacturing Company, respectively, during the period covered by the complaint herein, were as set forth in the stipulations appearing on pages 634 to 642, inclusive, of the transcript of record herein,* except that said two respondents' published list prices were the same, as to each product they sold, as the published list prices therefor at the time of the other respondents who sold such product.

3. That the invoices introduced in evidence herein as Commission's Exhibits Nos. 1574 to 1576, both inclusive, demonstrate the manner, form and substance of respondents' practices in making sales of their tire chains during the period covered by the complaint herein, such sales having been made in accordance with respondents' method of quoting prices arrived at by each of said respondents using, as it did, its published list prices, its published discounts therefrom, and its published extras thereon, as to each said product, which were the same as was published at the time by the other respondents selling such product, such quota- 2151

* These stipulations are reproduced in full at pp. 708 to 713, *supra.*

tions being made f.o.b. the manufacturer's plant with full freight allowed from the place of shipment to destination, irrespective of the point at which delivery was made, except that small shipments were sold f.o.b. mill with no freight allowed or prepaid.

4. That counsel supporting the complaint contend that in an average of 95% of respondents' total sales of each of the three types of chain and chain products (i.e., welded, weldless and tire) during the period covered by the complaint, respondents followed the pricing and selling practices hereinbefore set forth, whereas respondents, while
2153 conceding that said practices were followed, contend that they were followed in an average of only 80% of such total sales.

5. That the difference between the contentions of counsel supporting the complaint and the respondents herein with respect to said percentage figures of 95% and 80%, respectively, arises from the fact that approximately 20% of respondents' total sales, as evidenced by the invoices studied, were at prices or discounts or extras different from their published list prices, published list discounts, and/or published list extras; that counsel supporting the complaint concede that not over 5% of such total sales involved non-uniformity of prices among the respondents, and that the remaining 15% of such total sales represented sales to
2154 large buyers, including mail order houses and railroads, concerning which sufficient information is lacking (without extensive further study of invoices and the taking of testimony) to determine whether or not such instances involved non-uniformity of prices among the respondents.

6. That counsel supporting the complaint concede that, during the depressed business periods of 1932, the early part of 1933, and 1936 and 1938, respectively, the said estimated average percentage of respondents' total sales

in which respondents followed the pricing and selling practices hereinbefore set forth was considerably lower than said 95%, and respondents contend that during said depressed business periods said estimated average percentage was considerably lower than said 80%.

7. That the execution of this stipulation by or on behalf of any respondent shall not be deemed to be a stipulation by such respondent as to the accuracy of any facts or contentions herein set forth with respect to any type or types of chain or chain products except those which such respondent manufactured or sold during the period covered by the complaint herein; that as to any facts or contentions 2156
herein which relate to any type or types of chain or chain products which such respondent did not manufacture or sell, such respondent stipulates only that, if witnesses were called in support of the complaint or on behalf of other respondents herein, such witnesses would testify to such facts, and that the attorneys supporting the complaint and the attorneys for such other respondents would make the respective contentions hereinbefore set forth.

Dated: May 6, 1947.

FEDERAL TRADE COMMISSION

By /s/ Richard P. Whiteley
Richard P. Whiteley
Chief Trial Counsel 2157

AMERICAN CHAIN & CABLE COMPANY, INC.

By /s/ Frederick S. Duncan
Frederick S. Duncan

THE McKAY COMPANY

By /s/ Charles Denby
Charles Denby

2158 *Stipulation as to Certain Facts Regarding Invoices and Prices.*

THE BRIDGEPORT CHAIN & MANUFACTURING COMPANY
CLEVELAND CHAIN AND MANUFACTURING COMPANY
ROUND CALIFORNIA CHAIN COMPANY
SEATTLE CHAIN & MANUFACTURING COMPANY
WOODHOUSE CHAIN WORKS

By /s Sumner S. Kittelle
Sumner S. Kittelle

HODELL CHAIN COMPANY

By

Charles W. Sellers*

2159

ST. PIERRE CHAIN CORPORATION

By /s Charles Fay
by Sumner S. Kittelle
Charles Fay

S. G. TAYLOR CHAIN COMPANY

By s/ James E. S. Baker
James E. S. Baker

COLUMBUS McKINNON CHAIN CORPORATION

By ..... **
Elmer E. Finck

2160

* A separate stipulation of the same date was entered into between the Federal Trade Commission, per Richard P. Whiteley, Chief Trial Counsel, and Hodell Chain Company, per Charles W. Sellers. Said stipulation was identical with the foregoing stipulation except that it contained a paragraph numbered 8 reaffirming an earlier stipulation that Hodell Chain Company had joined the Chain Institute in 1935 but resigned therefrom in 1939.

** This stipulation was not signed by Columbus McKinnon Chain Corporation.

NIXDORFF-KREIN MANUFACTURING COMPANY
PEERLESS CHAIN COMPANY
WESTERN CHAIN PRODUCTS COMPANY

By /s/ A. Charles Lawrence
Sidney Levy

J. M. RUSSELL MANUFACTURING COMPANY

TURNER & SEYMOUR MANUFACTURING COMPANY

By .....
Norman King Parsells

PYRENE MANUFACTURING COMPANY

By /s/ Charles P. G. Fuller
Charles P. G. Fuller

INTERNATIONAL CHAIN & MANUFACTURING CO.

By /s/ Frederick B. Gerber
By Sumner S. Kittelle
Frederick B. Gerber

(The foregoing stipulation appears at pages 871 to 878, inclusive, of the transcript of hearings before the Federal Trade Commission.)

A separate but identical stipulation of the same date was entered into between the Federal Trade Commission, per Richard P. Whiteley, Chief Trial Counsel, and J. M. Russell Manufacturing Company and Turner & Seymour Manufacturing Company per Norman King Parsells.

2164

Stipulation as to Certain Facts Regarding Invoices and Prices of Columbus McKinnon Chain Corporation.

The respondent, Columbus McKinnon Chain Corporation, having heretofore, at the request of the attorneys supporting the complaint herein, furnished to said attorneys for study copies of all its invoices for chain and chain products sold during the month of October, 1941, and said attorneys supporting the complaint having caused a partial study to be made of said invoices, and it being desirable to expedite this proceeding to avoid further expense and time incident to any further study of said invoices or incident
2165 to the taking of testimony on the question of the pricing methods of said respondent, Columbus McKinnon Chain Corporation, and solely for the purpose of this proceeding and any court proceeding for the review or enforcement of any order issued by the Commission herein, and without making any admission of fact for any other purpose whatsoever:

IT IS HEREBY STIPULATED AND AGREED by and between counsel supporting the complaint herein and counsel for the respondent, Columbus McKinnon Chain Corporation:

1. That the invoices of said respondent, Columbus McKinnon Chain Corporation, heretofore introduced in evidence herein as Commission's Exhibits 1568 at pages 210 to 323, both inclusive, 1571, pp. 122 to 126, inclusive, and
2166 1574, pp. 528 to 538, inclusive, demonstrate the manner, form and substance of said respondent's methods of making sales of their welded chain and welded chain products, weldless chain and weldless chain products and tire chains during the period covered by the complaint herein, substantially all of said sales having been made at the prices contained in said respondents' published price lists and published discounts therefrom.

Stipulation as to Certain Facts Regarding Invoices and Prices of Columbus McKinnon Chain Corporation. 2167

II. That from 90 to 95% of said respondent's tire chain sales are sales of its patented "Claw" tire chains. The published price of said patented tire chain is different from the published price of tire chains manufactured and sold by the other respondents herein.

III. That said respondent, Columbus McKinnon Chain Corporation, does not manufacture weldless chain but purchases said product from other manufacturers in small amounts as an accommodation to its customers.

Dated May 23, 1947. 2168

FEDERAL TRADE COMMISSION

By (Signed) Richard P. Whiteley
Chief Trial Counsel

COLUMBUS McKINNON CHAIN CORPORATION

By (Signed) its Attorney, Elmer E. Finck

(Signed) Finck & Huber

(The foregoing stipulation appears at pages 926 to 928, inclusive, of the transcript of hearings before the Federal Trade Commission.)

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2170

Transcript of Testimony.

FRANK A. BOND (McKAY COMPANY), called as a witness for the Petitioners, testified as follows on September 30 and October 1 and 2, 1947:

Direct examination by Mr. Kittelle:

I live in Pittsburgh, Pennsylvania. I have been Vice President and Secretary of The McKay Company since it commenced business in 1919. From 1916 to 1919 I worked for The National Chain Company of Marietta, Ohio. From 1906 until 1916 I was with the Standard Chain Company of Pittsburgh, Pennsylvania. I commenced as a clerk,
2171 worked my way up to the job of assistant to the Secretary and General Manager and in 1913 I became Secretary and General Manager of the Company (967, 970, 971).*

The McKay Company manufactures welded chain, weldless chain and tire chains. We also make welding electrodes for arc welding which has nothing to do with our chain business. The National Chain Company for which I formerly worked made welded chain only, as did the Standard Chain Company (972).

As to the time when the McKay Company first commenced the manufacture of tire chain, The Weed Chain Tire Grip Company controlled the patent on Weed chains so-called, the only automobile tire chain in usage or existence at that time. That patent expired, I believe, on August 23,
2172 1921. The American Chain Company had succeeded to the Weed Chain Tire Grip Company, including its patent rights. The McKay Company commenced to manufacture tire chains at one minute past one o'clock, Eastern Daylight Savings Time, on the morning of August 24, 1941 [sic.]. We didn't want to give Mr. Duncan, patent counsel of the American Chain Company, any chance to start suit against

* Figures in parentheses refer to pages of the transcript of hearings before the Federal Trade Commission.

us for infringing his patents. We were ready to commence manufacture, since we had started to construct a plant for making that type of chain back in 1919 (972, 973).

The Standard Chain Company was taken over by the American Chain Company in 1916 through acquisition of all of its outstanding stock, including personnel. I didn't transfer to American but instead was instrumental in forming the National Chain Company. I knew that the Weed patents were going to expire in 1921 and that the reason American bought out Standard was because Standard had all of the electric welding facilities for producing tire chain. Anticipating the development of the automobile, it seemed to me that my future lay in preparing, 2174
if possible, for competing with American when the Weed chain patent expired and in view of the probable increased demand for tire chains (974).

My purpose in going to Marietta and organizing National was a part of my overall plan of securing financial backing to organize a company that would be financially strong enough to build an electric welding plant able to compete with American when its patent expired (974, 975).

Prior to the expiration in 1921 of the Weed patent on tire chain held by American, the McKay Company or (as it was known prior to 1931 when its name was changed) the United States Chain and Forging Company, produced the tire type of chain but sold it for other purposes. It was a welded chain. Today the component parts of a tire chain are welded chain. At that time, however, the cross 2175
chains, the members that strike the ground, were welded and the side members to which the cross chains were attached around the periphery of the wheel were weldless chains. The type of chain was called lock-link. Today the side chains are welded (975, 976).

When I was with Standard it had plants in Braddock, Pennsylvania; Columbus, Ohio; Marion, Indiana; St. Mary's, Ohio; Mansfield, Ohio; York, Pennsylvania; Car-

lisle, Pennsylvania; and Sarnia, Ontario, and when American took over Standard in 1916 Standard had all those plants (976).

The National Chain Company which I helped to organize had only one plant, this in Marietta, Ohio, which in 1919 became amalgamated with the United States Chain and Forging Company, the predecessor of the McKay Company. The United States Chain and Forging Company also had the plant of the James McKay Company at McKees Rocks, which is the Pittsburgh District, and the plants of the Haddon-Corbett Chain Company at Columbus, Ohio, and Huntington, West Virginia. In 1919 it started to build an
2177 electric welding plant in York, Pennsylvania (977).

At present, the McKay Company, successor to United States Chain and Forging Company, has the York, Pennsylvania electric welding plant and a plant at McKees Rocks, Pittsburgh District. The Marietta, Ohio plant, which was a fire welding plant, was eventually dismantled and the property sold (977, 978).

At our present McKees Rocks Plant we make fire-welded chain and in our York plant we make electrically-welded chain, weldless chain and arc welding electrodes (978, 979). We also make tire chain at York which is a welded chain (980).

At York we make several types of weldless chain—the so-called pump chain and a type that we call Victor, called by various trade names by the other manufacturers, which
2178 is a double-loop, twisted, link chain. We do not make any of the so-called sash and kindred chain but we purchase it from American Chain Company and resell it. It is a rather small and insignificant type of chain. Sash chain is a flat-link, stamped chain, stamped out of flat metal used as a substitute for sash cord in raising and lowering windows (978, 979).

We didn't make it ourselves because it comes in so many different types and sizes which necessitates a lot of expen-

2179

sive machinery. We get a special manufacturers' courtesy discount from American beyond their regular published discount so we are able to resell and make a small profit if not break even (979).

The Standard Chain Company made welded chain by fire and electric welding processes. They had an electric welding plant at York. They started the electric welding process experimentally in about 1905 with one machine and in 1906 or 1907 they began to really build machines and attempted to produce chain by that process. It took them two or three years to bring up their commercial production to a point of quality that we felt measured up to the standard that we required to sell our product (980).

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Fire welded chain today can be made to cover a full range of sizes of welded chain but it isn't economical to make the smaller sizes except in certain types that are needed. Dredge chains, anchor chain for ships, et cetera, are still made fire welded. It is no longer a handmade operation. It is made by a sort of semi-blacksmith process under hammers and dies (980, 981).

The McKay Company today makes electric welded chain from about No. 15 gage wire up to one inch in diameter. This is accomplished on automatic and semi-automatic machines (981).

When I first came with the Standard Chain Company in about 1906 that company had in its employ a man named J. E. Seitz who prior to my time had been secretary to the president of the company at York, Pennsylvania. Seitz 2181
eventually was moved to Pittsburgh where he was manager of the order department. To the best of my recollection, when American took over Standard, Seitz remained in charge of the Pittsburgh office and later was moved to Bridgeport, Connecticut. He went with American, whereas I did not (981, 982).

McKees Rocks, Pennsylvania, is about six miles from Pittsburgh and York, Pennsylvania is about 225 miles southeast of Pittsburgh and south of Harrisburg (982).

When I came with Standard in 1906 it was selling welded chain f.o.b. Pittsburgh basis. It had plants located at various parts of the country. So, you would invoice them just as though they had been shipped from Pittsburgh. If the freight from one of the shipping points was greater than the freight from Pittsburgh, you would add the Pittsburgh-to-destination freight and, on the face of the invoice, allow or deduct the higher freight rate from the factory to the destination. The buyer actually paid Pittsburgh plus the freight from Pittsburgh to his place of business. The buyer paid the freight. The adjustment was made on the face of the invoice (983).

2183 By way of example, if the plant that Standard had at York was shipping welded chain from that plant to a customer in Pittsburgh they would bill it on the flat f.o.b. Pittsburgh price and allow the customer the freight from York to Pittsburgh. He would pay the railroad from York to Pittsburgh and Standard would give him credit for that on the face of the invoice. The net cost to him to get the goods to Pittsburgh—if Standard's published price was ten cents a pound, Pittsburgh—would be ten cents a pound. In other words, he would pay no freight. If a man in Philadelphia bought from the York plant he would pay the freight from York to Philadelphia but Standard would charge him the freight from Pittsburgh to Philadelphia. In such a case Standard would get the benefit of the York location of its plant so far as that shipment was concerned.

2184 Standard would allow him the freight from York to Philadelphia, so that he would pay the York price plus freight from Pittsburgh to Philadelphia. The freight from Pittsburgh to Philadelphia might be—as an illustration, 40 cents—and from York to Philadelphia, 20 cents. Standard would have charged the Philadelphia customer the 40 cents and credited him with the 20 cents (984, 985).

Using Chicago as an example, if the shipment was out of York, Standard would charge the customer the freight

from Pittsburgh to Chicago, which let us assume was 50 cents, and then allow him the 70 cents from York to Chicago, assuming that was the rate that he actually paid. Under such circumstances Standard stood the difference between the Pittsburgh-to-Chicago and York-to-Chicago freight costs so that the customer would be paying on a Pittsburgh basis. Standard used this method of selling its welded chain up to the time that I left the company (985-986).

"Trial Examiner Ballinger: When was that?
"The Witness: In 1916" (986).

Direct examination by Mr. Kittelle resumed:

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The National Chain Company which I organized and with which I went in 1916 made welded chain and they sold on the same f.o.b. Pittsburgh basis (986).

Subsequently the National Chain Company became part of the United States Chain and Forging Company, the latter by change of name now being known as the McKay Company. When the United States Chain and Forging Company came into existence it used the f.o.b. Pittsburgh basis of selling and has continued to use that method up to the present time (987).

As to the reason for Standard Chain Company using the f.o.b. Pittsburgh basis of selling, I presume that it was because it was the historical method of selling, by reason of the fact that in the very, very old days, long before my time, the three largest chain manufacturing concerns were located in Pittsburgh. The Baker Chain Company,— (987, 988). 2187

As to the reasons for the Standard Chain Company using that method of selling, I know that we had, as I said, a lot of plants scattered all over the country, headquarters in Pittsburgh and the largest plant located in Braddock, Pittsburgh District. Naturally we sold on an f.o.b. Pitts-

burgh basis. That is the way steel was sold. We then got our steel from the Pittsburgh District (988).

"Trial Examiner Ballinger: When you first entered the business, were they proceeding on an f.o.b. Pittsburgh basis?

"The Witness: Yes, sir, definitely" (988).

* * * * * *

"Trial Examiner Ballinger: And that has continued ever since, has it?

"The Witness: Yes, sir" (989).

Direct examination by Mr. Kittelle resumed:

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Based on price lists that I saw and the records that were available to me, Standard Chain Company had been using it before I entered the business—since 1901. That was when that company was formed (989).

When I organized the National Chain Company I adopted the f.o.b. Pittsburgh method of selling for practically the same reason. That is the only way I had known the chain had ever been sold. Why should I sell welded chain any differently? (989).

The Pittsburgh-plus method of selling is not used on stud link anchor chain. Stud link anchor chain is the chain that is attached to an anchor when a ship lets an anchor down. It is attached to a big, long chain called a stud link anchor chain, because in the center of the link there

2190 is a stud. In other words, this is the shape of the link (illustrating with his hands) and right in the center of it is a stud which is put there for the purpose of preventing any squashing of the link under strain or stress which would make it of the dimension that would not ride the wildcat and they wouldn't be able to draw the anchor back up. The stud is that metal bar that runs across the link and it is for the purpose of preventing distortion of the link (989, 990).

The old Standard Chain Company made stud link anchor chain and they sold it principally delivered in order to meet competition. As to computation of price, you would make an estimate of the cost and decide on the margin of profit, if any, then add the freight from your plant to wherever the chain was required to be shipped to. The freight added was not the freight from Pittsburgh, but the freight from the plant where the chain was made (990, 991).

We sold the stud link anchor chain principally to shipbuilders. It was not a stock item that we made and kept in stock nor was it included in our regular published price schedules. Rather we made it on the basis of special orders (991).

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As to its place in the welded chain business back in the days of the old Standard Chain Company, it varied like everything else, depending upon the activity of shipbuilding. Sometimes you'd be fairly active in it, and other times you wouldn't have any business (991).

The National Chain Company also made stud link anchor chain and sold it f.o.b. Marietta, Ohio or f.o.b. Marietta plus the freight from Marietta to make it delivered to the shipbuilders (991, 992).

The McKay Company has made and makes stud link anchor chain and sells it on the same basis. We sell it competitively by figuring out the price based on what it costs to make it at McKees Rocks, and we take a guess on what we can get for it and quote the man a delivered price either at the shipyard or f.a.s. New York, if it happens to be export (992).

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There are other manufacturers of stud link anchor chain. Some of them I might term the "old line" established companies. American Chain Company makes it at Braddock; Carroll Chain Company at Columbus, Ohio; Woodhouse Chain Works at Trenton, New Jersey; S. G. Taylor Chain Company at Chicago; Cleveland Chain Company at their Seattle plant; and the Baldt Anchor Chain and Forge Company, Chester, Pennsylvania (992).

Quite frequently I would come across competitive quotations of these various companies on their stud link anchor chain. When you quote and are told that your price is badly out of line, sometimes you are given an opportunity to juggle your price to meet that condition, and most times they tell you, "I'm sorry, but your price is 20 cents a hundred pounds higher," or whatever the answer may be (993).

As to the use of this information in determining how these other companies were selling their product, i.e., f.o.b. Pittsburgh, delivered, f.o.b. plant, etc., if we quoted on a delivered basis and somebody told us that our price
2195 was high, then the other man was quoting or must have quoted a lower price delivered. That is the way we reasoned it out (993).

The Standard Chain Company, when I was with it, had dealings with the Weed Chain Tire Grip Company (993).

"Q. So the record will be clear, what was the relation between the Weed Chain Tire Grip Company and the present respondent American Chain and Cable Company, if any? A. I don't quite get the drift. You're talking about the Standard Chain Company.

"Q. No, I was asking you whether—I think Mr. Steinhauer would probably stipulate the Weed Chain Tire Grip Company is the predecessor of the American Chain and Cable Company. Is that right?

2196 "Mr. Steinhauer: Yes.

"Mr. Kittelle: All right" (993, 994).

Direct examination by Mr. Kittelle resumed:

As to the dealings between Standard Chain Company and Weed Chain Tire Grip Company, from a period of about 1906 or 1907 up to 1916 when American Chain Company acquired the Standard Chain Company, we were their

source of supply on the welded chain used in the manufacture of Weed chains. Weed did not make welded chain then. They were assemblers of their tire chain (994).

I had no discussions with any competitors in the welded chain business with regard to this f.o.b. Pittsburgh method of selling when I was with Standard Chain Company. I never had any discussions with them with regard to whether that method of selling ought to be continued. Never, while I was with the old Standard Chain Company, did I have any discussions with them with regard to whether that method of selling ought perhaps to be changed to something different (994, 995).

I had no correspondence with competitors on any of 2198
those three subjects nor did I ever overhear any conversations of that type among competitors. No one in the Standard Chain Company told me that he had had such a conversation (995).

When I organized the National Chain Company and adopted the Pittsburgh-plus method of selling, I did not discuss that with any competitors. I merely copied the American Chain Company's prices. At that time American had taken over Standard (995).

At no time while I was with National did I overhear any discussions between competitors nor engage in any discussions among competitors on the subject of the Pittsburgh-plus (996).

I copied the American Chain Company's prices when
I organized National to be competitive. American was 2199
the leader in the field and I would naturally copy their price list. I gave no consideration to putting out a lower price or a higher price than they did because a higher one would be out of the question. Why would I put out a lower one? I thought I could sell chain competitively with them as long as I met their prices (996).

As to whether I could have put out a higher price, that would be foolish. I wouldn't have secured any business.

You can't sell chain at any higher price than the American Chain Company (996, 997).

I could have charged a lower price and gotten more business for a small shot-in-the-arm basis. It would not have lasted very long, I'm afraid. They would have met my price and then I'd be just back where I started (997).

I had no discussions with any competitors on the subject of the Pittsburgh-plus method of selling at the time the National Chain Company was amalgamated into the United States Chain and Forging Company, which is now the McKay Company. There's just no reason in the world why I'd ever think of discussing that with anybody. It's
2201 just so ingrained in me that I wouldn't think of anything but that (997).

I did not overhear any such discussion among competitors in welded chain during the period of the McKay Company which extended from 1919 up to the present time or date of the complaint (997, 998).

I did not have any correspondence with competitors on the question of Pittsburgh-plus selling or whether it should be changed or continued. We have not given as yet any consideration in the McKay Company to changing from that method of selling to something else on welded chain (998).

The McKay Company is free to change from the Pittsburgh-plus method if it wants to (998).

I am familiar with the Donley freight book which is one
2202 of the exhibits in evidence. The McKay Company uses this book. As to other sources of information on freight rates on welded chain, besides the Donley book, the same Charles Donley for whom the book is named is traffic counsellor for the McKay Company. He is located in Pittsburgh. He is on a monthly retainer from the McKay Company. He is in business for himself and represents others including people not in the chain industry (999).

The United States Chain and Forging Company first started to make the so-called weldless chain about 1928 although it had made the lock link type of weldless chain for use as side chains for tire chains back in 1921 when it started to make tire chains (999, 1000).

"Q. That lock link type, did you sell any of it outside, other than as tire chains, or was it all used for tire chains? A. Oh, no, some small sale or demand for it. There was in those days."

The weldless chain that we made in 1928 is one general type of chain out of which different classes of chain assembly units are produced. We call it the Victor pattern. American Chain called theirs Tenso. It's a double-looped 2204
chain with a knot in the center of it. From that chain you make pump chain, well chain, tie-out chains for staking out cattle, cow-ties for tying cows to the barns, porch swing for suspending the old-fashioned wooden type of porch swing and various assemblies (1000).

In 1928 we made what we call a pump chain, which is almost like a figure 8 with reverse loops. There is no wire twisted around the chain. It is just butted. We have not made any other types of chain since 1928 and we still make the types I have described (1000, 1001).

In 1928 when we entered the weldless chain business on a commercial basis, The Bridgeport Chain Company at Bridgeport, Connecticut; the American Chain Company at Bridgeport, Connecticut; the Cleveland Galvanizing Com- 2205
pany at Cleveland, Ohio; and the Cincinnati Pump Company at Cincinnati, Ohio, were then manufacturing weldless chain (1001).

The Cleveland Galvanizing Company is still in business though their present name is the Hodell Chain Company (1001).

We did not buy and sell weldless chain prior to 1928. We did not start to buy until we began to manufacture and sell our own. When we went into the manufacture of it

2206 *Frank A. Bond—For Petitioners—Direct.*

in 1928 we investigated the method of pricing and selling which we might use. We got hold of our competitors' price lists from our jobbing friends who bought the chain from those competitors. We found that these competitors were selling weldless chain by equalizing freight with each other's factory location point. At that time freight was equalized with points at York, Bridgeport, Cleveland and Cincinnati—Cincinnati just on certain types of chain (1001, 1002).

At the time when we started manufacturing weldless chain, I think that it was in 1928 that American moved its weldless plant from Bridgeport to York. I think they had it there
2207 before we started. Yes, I am quite positive of it (1002, 1003).

As to the "equalizing" of freight with various points and the method of billing, if you happened to sell a man in Cleveland and you shipped to him from York, you had to allow him the freight from York to Cleveland because he could have bought it in Cleveland without paying any freight (1003).

We sold f.o.b. York. If we sold a man in the City of York, he wouldn't pay any freight, but would buy at our list price. If we sold somebody in Pittsburgh weldless chain, we would have to check up very carefully the freight rates to see whether the freight was less from Cleveland or from York to Pittsburgh, and whichever way it happened to be, why you'd either charge him or credit him for the
2208 difference. In that case the advantage is slightly in favor of Cleveland because the freight rate from Cleveland to Pittsburgh is less than from York (1003, 1004).

To sell in Harrisburg, Pennsylvania you sell on the basis of only paying the freight from York to Harrisburg because York is the closest basing point or producing plant to Harrisburg. The buyer would in this situation actually pay the railroad or transportation agency. We would not prepay

it, nor, if we were selling the buyer in Harrisburg, would we make him any allowance for the freight (1004).

In the case of a buyer located in Toledo, Ohio, we would, in connection with the billing of that buyer on weldless chain, determine what the freight was from—in that case it would undoubtedly be Cleveland—from Cleveland to Toledo, and York to Toledo, and we would charge him Cleveland to Toledo freight and allow him the York to Toledo freight, so he would be paying on the basis of the lower of the two freight rates, which would be from Cleveland to Toledo. The buyer would actually pay the transportation. We make all equalizations on the face of the invoice (1005).

2210

I believe that I am familiar with the term "phantom freight". To me it means for instance, if we shipped to a man in York on an f.o.b. Pittsburgh basis, and it cost no freight to deliver him but we charged him the freight from Pittsburgh to York, that would be phantom freight. I would say that there is no phantom freight on our shipments of weldless chain. In that case you always give the customer the benefit of the freight from the nearest producing point to his place of business, so he would never be penalized. The producer or manufacturer is penalized, of course, in meeting those basing point conditions (1005, 1006).

We sell a few pieces of weldless chain to customers in York occasionally. A York customer would pay in total, including all transportation charges, whatever our list price might be in York. There would be no freight involved. A customer located further away from our plant than York would not pay any lower price than the York customer paid. It couldn't be any lower price. He would have to pay the freight, whatever it might be. The lowest price would be to a customer in York as far as the McKay Company is concerned (1006, 1007).

2211

"Mr. Steinhauer: Or any other basing point?

"The Witness: Sir?

"Mr. Steinhauer: Or any other basing point?

"The Witness: That would be true. He's only asking me as far as the McKay Company in York is concerned" (1007).

Direct examination by Mr. Kittelle resumed.

A Cleveland customer of ours would pay exactly the same price that our York customer paid at the same time. It would be true in any case where a basing point was located. We would have to allow the freight, so he would
2213 buy on the same basis as the customer in York. When we sell a York customer, all of the money that he pays actually comes to us (1007).

When we sell a customer in Harrisburg all of the money which he pays us actually stays in our pocket. I believe that I am familiar with the term "mill net return". My interpretation would be, just as in the Harrisburg case, of what we actually get after we paid these freight allowances, either charges or credits—what is the net amount which the customer pays us (1007, 1008).

As to our mill net return in the case of a sale to a customer in Cleveland, we'd be out the difference between the freight from York to Cleveland as against no freight if we sold that same merchandise in York.

2214 We have a cost system in our business and I would say that we average all our costs in determining how we are coming out on our prices. As an illustration of such averaging, we put in all our raw material and all our labor and all our fuel and all our electricity and all our legal expenses and all our selling and administrative expenses and out of that comes the final answer and we have sold so much overall on a grand average basis, and if there is anything left it's either a profit or a loss between those two sets of figures. We average freight (1008).

2215

Our raw material costs us the same amount no matter into what man's product it goes, but there is an average on this basis, that there are extras for sizes and so forth. If you want to get down to the minute detail, to what a specific item like dog chain costs in relation to anchor chain, why then your cost system picks out individual specific items to determine that. But on your profit and loss figures, why everything goes into the one common pot naturally. You can't segregate and keep profit and loss elements on individual items. We handle the value of our inventory on raw materials, in the case of fluctuating prices, on the new modern method of last in, first out (1009).

2216

We do not charge each particular customer with the price of the particular rod that went into his particular chain. We have a published price and regardless of what the material may cost us, either fluctuating up or down, until that price is changed we charge everybody that price. We average the raw material costs there (1009).

We have had a few customers that haven't paid their bills. Our mill net return when a customer doesn't pay his bill is zero. We write off our bad debts in our accounting system, averaging them (1010).

2217

We have about 22 salesmen making contacts with customers. The salesmen have territories all over the country. The cost of the salesmen is not the same in the different territories. It varies based on a number of conditions. First and most important I would say was the volume of business available in a given area, the potential possibility for a salesman. Secondly would be the salesman's ability as a salesman. We pay our salesmen a salary and a bonus if they meet certain quotas that are set up for them. We do not make different prices in different salesmen's territories to reflect the differences in the cost of selling in such territories. We only make differences in price to meet competitive conditions. Prices are the same in all territories (1011).

Our selling costs are among the costs that we average. Our collection of price lists in 1928 when we started making weldless chain showed us how Bridgeport Chain Company at Bridgeport was selling. They sold on an equalized basis the same as American Chain Company. They had an f.o.b. point at Bridgeport, freight equalized with other producing points. We secured information as to how the Cleveland Galvanizing Company was selling at that time. They were selling on the same basis. Their f.o.b. point was Cleveland. They had to do equalizing with York and Bridgeport in order to sell wherever the freight was greater from Cleveland than it was from any of those other points (1012, 1013).

2219 The Cincinnati Pump Company located in Cincinnati, Ohio in 1928 made just one type of chain, which we describe as Victor, being an item that they used in the old-fashioned pumps that they used to manufacture and sell, and they had a surplus capacity of it. They sold that first as such, as pump chain, and then they later sold it in assembled form such as tie-outs. They sold any old way. Theirs were only sporadic entries into the market, and if they had some chain to unload—boy, they unloaded it. The chain they made was the kind with two loops and the twist around the center, wrap around the center. They did not make the other type I mentioned (1013, 1014).

2220 We equalized freight with Cincinnati on whatever our competition was from Cincinnati. Pump, such as for instance tie-outs, cow-ties, and porch swings, and what we would term the Victor pattern chain, which is the twisted link type. We did not equalize freight with Cincinnati on the untwisted type I described because they did not make that type. We did equalize with Cleveland on that type and the other type, the twisted. Our purpose in equalizing with these points was to be competitive. You just can't sell chain or any other product at a higher price than your competitors and, therefore, if Cleveland Galvanizing Com-

pany, or rather Hodell, was selling weldless chain on an f.o.b. Cleveland basis, we certainly had to sell that same commodity on that same basis, so that any point where that freight was less than our York freight was, we would be competitive (1014, 1015).

We could for a period have sold weldless chain at a lower price than they did in Cleveland. For a period you can always sell anything lower, but we did not consider doing it at all. As I previously stated, why should I sell lower unless I absolutely have to? I have too much pride (1015).

"Trial Examiner Ballinger: What would have been the result if you had sold lower? 2222

"The Witness: Well, for a short period, maybe two or three days, I might have been able to scoop a little business before the other fellow caught up to me, sir, and then he'd meet my price, and then all I would have done would have been lowered my income, reduced my selling price. It just isn't done that way, Mr. Kittelle" (1015, 1016).

Direct examination by Mr. Kittelle resumed.

Today the McKay Company sells weldless chain on the same basis. There has been no change in the basis from 1928 up to the present time. There might possibly be an item that might be included. There is an outfit up in Holland, Michigan, the Holland Furnace Company, which 2223 makes furnace chain. When they have a surplus they sometime sell it, and you have to meet that competition, too. I don't know when they came into the picture (1016).

Furnace chain is little unwelded chain that lifts the doors on furnaces in your cellar where you have a thermostat, a little jigger that you turn up in the kitchen, and the chain runs down and lifts the damper, and that kind of stuff. It is made out of wire (1016, 1017).

I would like to correct my previous testimony. I think that I made two slight misstatements, one in answer to the question about the type of material that the Holland Furnace Company's furnace chain is made out of. I believe that I answered "wire". The answer is flat material, not wire (1018).

The other pertained to the Cincinnati Pump Company. I said that this company did not make untwisted type of chain. They did make it. They originally made what is termed pump chain. That is the S-shaped chain, not twisted. They actually made that type of chain. That was their original chain which they furnished with their pumps

2225 (1018).

Later they made the type which we term the Victor or the Tenso twisted type (1018).

When they were making only the pump type, we equalized with them on that product. When they began making the twisted type of weldless chain, we equalized freight with Cincinnati on that (1019, 1020).

Now, going back to welded chain and the f.o.b. Pittsburgh basis—as to whether we allowed more freight than we added, taking our business as a whole on welded chain, there is more chain sold in areas where the freight is greater and therefore we have to absorb a certain loss. When I say freight is greater, I mean, for instance from the plant it is shipped than from Pittsburgh. When we

2226 made shipments of welded chain from our plant at McKees Rocks, Pennsylvania, the customer did not pay more freight than the actual freight from the plant to the destination. It is on an f.o.b. Pittsburgh rate and the basis and the freight rates, in the majority, if not practically all, are the same from McKees Rocks as from Pittsburgh (1021).

We tally up our costs and have a statement of what our profits are once a month. As to our method of determining our costs and profit, of course all our expenses are put

into one side and our income is put in the other. You put in your raw material and labor and waste and fuel and overhead and selling, expense, advertising, freights, your burdens in the plant, your depreciation, and when that is all washed up it gives you a certain figure. To offset that, of course, you have a certain income from your sales and you either have a profit or a loss. We do not attempt to allocate these various items of cost on the basis of either the type of customer or the location of the customer or the type of sale (1021, 1022).

When a customer doesn't pay his bills or fails to pay them regularly we quit selling him. We have run into situations where the freight that we had to allow in order 2228
to get any chain product to a certain destination was very great. When the going gets too tough, you let the other fellow have the business. For instance, if somebody quoted a delivered price in Texas or some far distant point, the freight rate would be quite a factor. It might reach a point where we would decide we didn't want that business, thought it was foolish enough at that figure and we just wouldn't attempt to compete in that case (1022).

The McKay Company generally tries to sell its chains of all types all over the country (1022).

Examination by Trial Examiner Ballinger.

In our monthly statements, showing profit and loss, the freight would appear as a deduction from our income and 2229
the cost against the sale. That would show whether or not during any given month we profited by freight or lost by freight. If it should show up the other way, that would turn up in red, as a credit (1022, 1023).

Direct examination by Mr. Kittelle resumed.

I would say we have never had in our over-all operation a red freight cost, that is, we have never made a profit on the freight.

When the McKay Company started making weldless chain in 1928 we did not have any discussions with any of our competitors, either at or about or previous to that time, as to this method of selling which I have been describing. I did not write any letters to them or receive any from any competitors. I didn't even tell them that we were going to start in the business (1023).

2231 We have not made any change in that method of selling from 1928 up to the present time. During that period we have not had any discussions with any of our competitors with regard to that method or whether it should be continued or changed or anything. We have not had any communications with them of that sort at all. I have not overheard any such conversations or communications between or among any of our competitors nor have we ever given any consideration to selling weldless chain on any other basis (1023, 1024).

The Holland Furnace Company in Holland, Michigan manufacturers heating furnaces (1024).

"Q. And you mentioned a type of chain that they manufactured, is that right? A. Well, there is a little piece of
2232 furnace chain on it that manipulates the drafts and so on on the furnace" (1024, 1025).

The chain is a part of the furnace when the furnace is sold. They also sell it apart from the sales of furnaces. That is where we sometimes have to compete with them on a Holland, Michigan basis; they sell the surplus production at times. We do not manufacture that furnace chain but buy it from American Chain Company. It is within the classification of sash and kindred chain (1025).

I have testified as to certain points with which freight is equalized. I testified that there was York, where our plant is, and Bridgeport and Cleveland and Cincinnati on the chain that they make there and Holland on this furnace chain (1025).

There are not to my definite knowledge any present manufacturers of weldless chain whose plants are located at other places than these points. It is possible that some of the welded chain manufacturers might have weldless chain machines that I know nothing about (1026).

I know companies that sell weldless chain that are located at other points. I don't know whether or not they make weldless chain. They might buy it like we do, certain 2234
items that we don't manufacture. I know of the Turner & Seymour Manufacturing Company and the J. M. Russell Manufacturing Company. I know that they are located up in New England someplace. I couldn't even pronounce the names of the little towns (1026).

When we started manufacturing weldless chain in 1928, we arrived at our published prices for the weldless chain by copying our competitors'. We found out our competitors' prices by getting a copy of their price list from some of our jobbing or customer friends. As to the copying of competitors' price lists, my recollection is that they were all alike, but I would have said we would have copied the American Chain Company's for the same reasons we copied their welded chain. They are the largest and recognized leader in the industry. We did not consider putting out 2235
a different price than theirs nor a lower price than they did. I wouldn't knowingly start in a new game like that and start to pick a fight with the biggest man in it right away. You just don't do things that way (1027).

I have testified that the McKay Company started to make tire chains in 1921, right after American's patents expired. At that time it was known as U. S. Chain & Forging Company. We investigated at that time how tire

chain was being sold by the same method as I stated about weldless, go to the trade and find out on what basis they are selling it. It was sold on the basis of the freight being allowed, or what we term a delivered basis, any place in the United States. You bill on the basis of f.o.b. your factory, freight allowed to destination. The buyer pays the railroad for transportation and you make an allowance on the face of the invoice (1028).

The allowance on the face of the invoice varies depending entirely on the location. As to the relation of the allowance to the amount of freight that the buyer has to pay, in the over-all average, as far as we are concerned, I would say
2237 about 5 per cent, but as far as the customer is concerned, it would depend on where he was located. If the buyer pays $1.00 freight, we allow him $1.00. On the average of our business, these freight allowances cost us about 5 per cent of our total sales of tire chain—five per cent of the selling price (1029).

We use the same method of selling on tire chain nowadays. We have made no change in that since 1921. We adopted that method in 1921 because the American Chain Company sold it that way (1029).

"Q. Well, did you give any consideration to any other method? A. Can't conceive of any that would beat that method."

As to the advantages of the method, it just simply makes it so that the price of the merchandise—for instance, a
2238 pair of tire chains for a Ford car will cost a jobber in Portland, Oregon exactly the same as a jobber in Portland, Maine. That is an advantage. Why should a man pay any more for a pair of tire chains on the Coast than he does up in Maine? We never gave a thought to charging an f.o.b. plant price, making it lower than American's, letting the buyer pay the freight (1030).

We (I mean the McKay Company) do not allow the buyer the full freight on any and all shipments of tire

chain. There has always been what is termed a minimum shipping quantity to justify or entitle him to freight allowance. At the present moment it is 24 pairs of passenger chains. Our present minimum weight allowance is 24 pairs. It has not always been that. Back in 1921 when we started it was five hundred pairs. Competition changed the freight allowance to 250 and 100 and 50, until today, as far as we are concerned, it is 24 pair. That happens to be the American Chain Company's freight allowance (1031).

When a buyer buys less than 24 pairs of tire chains from us now, we bill it to him f.o.b. factory and he pays the freight. We give him no freight allowance for that (1031).

We knew how to make tire chains when we started to 2240
manufacture them in 1921. I knew how to make them from away back in the Standard Chain Company, but in order to teach our organization, we simply went out and bought a lot of chains and there it was. There is the finished end product. You just had to duplicate it (1031).

We bought them from one of the American Chain Company's jobbers. They were American Chain Company chains. We had no discussion with the American Chain Company, either at or before the time we went into the tire chain business, as to the method of selling which we would use or might use. We had no correspondence with them (1032).

"Q. At the time you went in there, what other companies, if any, were selling, making tire chains? A. That particular day, sir, nobody. 2241

"Q. Except American. A. Except American."

I know other competitors entered into the tire chain business after we went into it. As to whom they are or when they came in, I don't think that is quite fair to ask me to remember all that. I just can't. I can tell you their names. I can't tell you just when they came in. They are Columbus-McKinnon Chain Company, Cleveland Chain

Company, the Western Chain Company, S. G. Taylor Chain Company, Pyrene Manufacturing Company, International Chain Company, and Nixdorff-Krein Manufacturing Company (1032).

The Taylor and Nixdorff-Krein were not manufacturing tire chains 15 years ago, though they manufactured welded chain of other types, including the type that tire chain is made from.

Since we commenced the manufacture of tire chains, we have not had any discussion with any competitors of ours on the subject of the method of selling or whether it ought to be changed or continued. I have not overheard such dis-
2243 cussions among competitors. I have never had any correspondence or communication with competitors on that subject. We are free to change from that method of selling if we want to. It wouldn't be a very healthy thing to do. I can't conceive of any better way of selling than that to meet the existing competition. We are privileged to do whatever we please though, of course (1033, 1034).

We are free to change from the weldless chain method of selling if we want to (1034).

Price of the product is quite a factor in whether a customer will buy from one manufacturer or another on, for example, welded chain. We have found that the customer will not buy from us if our price is higher than the other fellow's. It is practically a daily occurrence for a competitor of ours to make an offer to one of our customers
2244 at a lower price than ours, other than in times of unusual demand. A time of unusual demand would be such as during the war period, from 1940-41 (1034, 1035).

Price is also a factor in the customer's mind in buying from us rather than a competitor in the case of weldless chain (1036).

"Q. And have you ever had a competitor of yours offer one of your customers a lower price on weldless chain?

A. Boy, that's where they do take it for a ride, yes, sir" (1036).

As to the extent that price is a factor on tire chain, it is not to the same degree as in the other two types of chain because you get an entirely different commodity, what we term a merchandising commodity, that carries with it the prestige and the years of experience and the advertising, the quality, and the consumer and the jobber and dealer acceptance, of a given make of tire chain (1036).

We advertise our tire chains. We have used the customary dealer trade magazines and reached the consumers through consumer mediums. We have, in the past, used the Saturday Evening Post and Colliers and magazines of 2246
that type. We have a trademark on our tire chains. We have the reinforced chain with the Multigrip name trademarked (1036).

We do not have any trademark for our regular unpatented tire chain. The customer would know whether it was ours or somebody else's. This is by force of advertising and we put it up in a distinctive type of bag with red bands about it and the name "McKay" between the bands. In the days gone by, when we first started in it, we had "The Better Black Chains in the Red-Band Bag" (1037).

Quite frequently we have had competitors of ours offer a lower price on tire chain to one of our customers than we were offering. We have done nothing about that. We did not meet the price. We have lost some business. As
to the fact that we didn't lose all that business, we believe 2247
that our quality and prestige and acceptance in the trade gives us an edge on the lesser known types of tire chain (1038).

There are other manufacturers of tire chain who advertise. American Chain Company is a very, very large advertiser. There are also manufacturers of tire chain who do not advertise. We have compared our published prices with those of non-advertising manufacturers and have dis-

covered that the lists are identical. We have compared the actual selling prices of the non-advertising manufacturers with our prices and have discovered that they fluctuate and vary from being identical with ours to 5 and 10 per cent greater discount off the same published list as ours (1038).

With respect to this matter, I might say that my answer is entirely correct in so far as it would apply to some of these competitors of mine, and not to others. Certain of those manufacturers at all times had at least a 5 per cent lower actual selling price than I did. Their published discount that they offered publicly would be 5 per cent
2249 better than ours. That was usually 5 per cent. Then the other extras would be off the record and go beyond that. We did not meet that 5 per cent although we did lose some business by not meeting it. We did not meet the so-called extras that went beyond the 5 per cent. If we didn't meet the first 5 per cent, naturally we wouldn't meet anything beyond that (1041, 1042).

We did manufacture a so-called second grade tire chain. It is not what we called a second grade, but rather a substandard, and it would be made of lighter gage material, and instead of having the present welded side chain would have weldless side chain, and it wouldn't have as many cross chains in it as the standard specification chain. We made that product in the 30's, during highly competitive conditions. We did not put a McKay trademark or name on
2250 this chain. It was all special label brands. We have no special labels of our own. We would put on any name that the buyer wanted. If the buyer wanted his own name, we put that on it. If he wanted to give it a phonetic name, it was all right with us, just so it wasn't called McKay. We had no published price list for these substandard chains. We arrived at a selling price by finding out what some of the smaller—I called them gyp manufacturers—would be making, and then taking a shot at them. If they were

disturbing my business, it finally reached the point where I would fight back, and if they were cutting the price to my legitimate channels of distribution, I would go into their channels of distribution and I would certainly cut their price and give them something to worry about (1042, 1043, 1044).

We would not merely meet their prices. We would knock the pants off them. This occurred during the middle 30's when the going was real tough. It lasted for three or four years. The situation developed in about 1932 and 1933, improved during the period of NRA, and then picked up again in '35, '36 and '39 (1044, 1047).

Our purpose in putting out these substandard chains to 2252
meet their competition was, to be honest and frank about it, pure vindictiveness, getting even with the guy that tramped on our toes. The reason we didn't use our regular chains is because we would not under any circumstances, or at least have not as yet found any circumstances that justified or necessitated doing that same thing on the McKay brand of tire chains (1048).

We did get a substantial volume of business on these substandard tire chains. The competitors whose prices we were meeting with these substandard chains of ours were also selling substandard chains. They were selling their regular full weight tire chain on the basis I have previously described, following our published prices and then cutting the discount that we offered to our jobbers on that same published list (1048). Their discount would be at least 2253
5 per cent better than ours, that is, greater than ours, longer discount (1049).

Quite frequently, on welded and weldless chain, during this period we experienced having a competitor offer a lower price to one of our customers and we met it. It happened very, very frequently in the period from 1932 to 1939. Let me give you an illustration of the depths to

which discounts finally sank. The published discount is an illustration, of 33⅓ per cent from a published list. The actual price finally degenerated into 33⅓, three 10's, and in some cases a 5 beyond that, in some cases four 10's. That happened during the period from 1932 up to 1939, with the exception of the short period during which NRA was in being (1049, 1050).

We met those discounts. They applied on welded chain. That is merely an illustration of the depth of the price cuts (1050). During this period we initiated price cuts on both welded and weldless chain. We would do it for retaliation. Somebody cut a price on one of our pet customers
2255 some place, and to get even with somebody, we would perhaps go some place else and make a real cut.

I have no customers that belong to me. I have no vested interest in them. I fight every minute of my existence to hold them (1053).

Our competitors are trying to get our customers away from us all the time. I have got a lot of nice pets that they would like to take and they shoot at them constantly. I have shot at somebody else's customers. In retaliation I have done that, yes. I have lost customers to competitors, customers that we have had for a number of years in the welded and weldless field (1054).

As for our experience as to how far a customer's loyalty will extend, so that he will stand by us in the face of an offer of a lower price on welded or weldless chain, the
2256 answer has to be divided. Under conditions such as exist today, when merchandise is scarce and awfully hard to get, 2½ or 5 per cent probably would not influence those that are my pet customers. But in periods of depression, such as existed between 1932 and 1939, they cut your throat for a half of one per cent (1054).

If a competitor offers one of my pet customers a half of one per cent better price than I have, my pet customer tells me about it and gives me the opportunity to meet the

situation, but not in all cases. The rank and file of the buyers would pass you up and you would find it out the next time your salesman went around, that you lost the last order and it went to a competitor at such and such a price. The loyalty of customers on tire chain is entirely different. The loyalty is much more pronounced, sound and firm. It is a different class of jobbers and distributors. They handle automotive accessories (1055).

We sell our welded chain largely to the hardware and mill supply jobbers, and the mines, mills, factories, railroads, and other direct consumers of chain. We sell our weldless largely through the hardware jobber, very little through the mill supply jobbers who handle the heavier 2258
items of mill repair parts and supplies. There is some of the weldless, of course, also sold direct to manufacturers who use it as a part of some article that they themselves manufacture and sell. For instance, you would sell porch swing chains of the weldless type to a manufacturer of porch swings. You would also sell that item to a jobber who would sell it in small lots to a dealer where you, as an owner of an old-fashioned porch swing, could go into a hardware store down South and buy a set of porch swing chains, but we also sell direct to the manufacturer of the porch swing (1055, 1056). The jobbers who buy weldless chain are the same type of jobbers as the hardware jobbers (1057).

If I have to be pinned down to some specific percentage 2259
or figure, I would say that between 60 to 70 percent of our welded chain goes through jobbers as compared with the other types of customers that I have mentioned. As to the weldless chain, that would be a larger percentage, probably 80 or 85 percent jobbers. As to tire chains, our customers are largely automotive jobbers. They are not the same type of jobbers that handle the welded and weldless except in instances where a hardware jobber would have, as many of them do have today, an automobile accessory

department (1057, 1058). In addition to jobbers, we also sell our tire chains to the large fleet owners; some large taxicab companies; State highway departments (1058).

I have previously stated the factors about tire chains as a commodity that induced us to adopt this method of selling to users—f.o.b. mill with a whole freight allowance. That was the system in vogue for 17 years at the American Chain Company, and they enjoyed the monopoly given them by the Weed Patent, and they used it and it has been in vogue ever since (1058).

I have heard the expression "price wars". To me it means that you bring out, in the beginning, a price list
2261 and you are supposed to sell at that. Then, one of your competitors will lower it, will cut that price, and then you do it, to meet his, and then a number of competitors are involved, and you all gradually come down to this lowered-price level. You have these fellows, as I call them, "chiselers," and also as the past President aptly called them, when he introduced N. R. A., "chiselers." They cut it 5 percent, and then there is another cut of 10 percent, and—well, to make a long story short, you go along that way, depending on the conditions, of course, and it usually happens—in fact, it always happens—during a depression (1058, 1059).

It comes about during a depression; "depressed economic conditions," I believe would be the right phrase. And they keep that up, they see-saw back and forth. It means that one fellow would start, he would cut, and I would meet
2262 him, and then Competitor No. 3 would come in and meet my price, and that same situation would come to Competitor No. 4, and he would meet No. 3. And, the first thing you know, it is a free-for-all. Finally, as I have seen in some of these Colored free-for-alls, boxing bouts, I mean, we would all wind up in the gutter. That is what I mean by "price wars" (1059).

When you are in the gutter, there is only one place you can go to unless you want to drown, and that is—up. When

everybody is down there and after you have laid there in that gutter long enough, it has been my experience—and I have been in this game, as you all know, for a great many years, and it is the same in this game as in others—somebody finally reaches a point where he cannot stomach that any longer, and then they say, "To hell with it," and they come on up out of the gutter, and they raise their prices, by bringing out a published price list and that would start it.

Now, I will be very frank about it, about some of these times. There have been times in this game where if somebody had come out with a higher published price list, I would have kissed him in a public square in Washington 2264
before a million spectators in size. I am talking about this industry (1059, 1060).

Examination by Trial Examiner Ballinger:

As to what happens when you bring out the increased price list, what I meant there was—perhaps I should not have been facetious, when I was talking about kissing them. When that list comes out, why, of course, they all follow, and everybody brings out a new price list, and for a period of time, as the saying goes, everybody is good, until some pernicious chiseler starts the whole ball rolling again in a greater or less degree, all over again. It is always about the same, it is always repetitious—it comes in cycles (1060, 1061).

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Direct examination by Mr. Kittelle resumed:

As to how frequently that happened in the chain business, in the last 15 years, wait a minute—1933. As I have previously recited, you have a cycle there: From about 1932, when the depression hit, until about 1939, and that was a period in which we had what I would term a very,

very destructive price war. That covered that entire period with the exception of the short period of N. R. A. activity, I wouldn't say positively, but in a certain segment there was an up-surge, 1936-1937; I believe there was an up-surge (1061).

The price war came to an end in 1939. It was brought to an end because the demand began to increase, and when the demand increases, the tendency to cut prices, of course, gradually disappears, because you can get a fair share of the business without having to do so. There is an increased volume of business without having to cut prices. That increase in demand was caused, first by what was called
2267 the Defense Program, which later developed into the war program. There has not been any recurrence of price wars since the beginning of the recent war (1061).

In the period from the beginning of the recent war to the present time the industry has not been able to satisfy the demand. Of course, during the war we did a magnificent job, but the ordinary jobbers and the users were not able to get any. It was all furnished and channeled through directly into war uses (1062).

We have made profits in the chain business. We have not always made profits on chain. There have been periods when we have been in the red. Following what they called the First World War, we had a period back in 1921-1922 and then from 1932 up to 1940 when I would say we lost money every year, with the exception, again, of that up-
2268 surge in 1936 or 1937, whichever it was, and the N. R. A. period. Well, we lost money during the N. R. A., but not so much and it minimized our losses (1062).

Automobile accessory jobbers do not carry generally an adequate inventory to take care of needs for tire chains that come up in their territories during the winter. They start out with an initial stock which they feel, perhaps, is enough to take care of the winter demand initially. If there are no unusual weather conditions, it might. That is what they

predicate it on, that stock. They do not and they cannot carry sufficient stock that would be needed or that would be required if they had an unusually severe winter. To supplement jobbers' stocks in the various territories, before the war, we maintained between 20 and 25 warehouses scattered all over the country. Some of these were public warehouses and some were our own in rented warehouse space. The majority of them were, however, in jobbers' warehouses, where a jobber handles the chains and warehouses it for us. It is not a consigned stock to the warehouse. Certain large and well-equipped jobbers enter into a contract with us to warehouse a stock of our tire chains and they would ship those chains as we directed them 2270
to, to other jobbers in our areas, and they would report that, just the same as the factory would report a shipment. They were, of course, privileged to withdraw on the same basis. It was not consigned (1063-1064).

We did the billing (1064).

* * * * * *

We have run into a condition in this industry where there has been a severe snowstorm. During that type of situation, in the ordinary course of events, as recited to me, where we have those warehouse stocks, we do a reasonably good job of taking care of the general situation. We have it so that, in our jobbers' warehouses, and considering their warehouse stocks, I doubt whether they would be dissipated overnight, those stocks, so that we would be 2271
up against the necessity of making shipments from the factory into these areas, but that happens. I am speaking of the ordinary course (1065).

During an acute situation we have shipped carloads by express to get them into a certain stricken area in a hurry. Quite frequently we have found ourselves in a situation of that kind, where we were unable to supply the entire demand. I specifically and definitely recall a situation

where all the chain manufacturers combined were not able to take care of the situation properly in the time required (1066).

There is not any market in any particular locality in the United States that is a good tire chain market, year in and year out. None, that you can pin your faith on definitely. That is in the hands of the Lord. In these places up in the northern part of the country you have your ups and downs, too. Sometimes you will have two or three winters in a row where an acute situation exists, and then again you will have—well, I can explain it for your benefit. The fact that Minnesota might have the cold-
2273 est year in history does not necessarily mean that we would therefore have a big tire chain business, because we must have precipitation, we must have snow and ice, and if it gets realy cold, then you do not have any snow and ice, and the cold does not do us any good (1067).

We must have the snow and ice, of course, that is the thing that actually justifies the need for tire chains. For forty years we have been trying to figure out a way of predicting where tire chains will be needed. We haven't yet found the answer. I wish we could. The way it works out, based on the law of averages and past performances—perhaps we will find that we had 12 snowstorms in Massachusetts, say, last year. Therefore, we are very much on our toes on that situation, and likewise, so is the jobber, and he is pressing us to increase the amount that is going
2274 to be sent there, and he wants more of the chains put in that area in the warehouse (1067).

Then you do it and the next year you only have two snowstorms in Boston, and you have 14 in Kansas City, and then you are in a hell of a fix. When we have had a market like that, where we expected a lot of snow and did not get it, we try to ship our stocks, if possible, in time to meet the need in the other area; but you must remember snow and ice wait for no man—not even for a tire chain.

manufacturer. And you take in the South, in the Carolinas, and we have had it in Atlanta and as far as Birmingham, a condition where you have these terrible snow and ice storms down there. They have those storms, and those storms paralyze everything and everybody. Well, now, of course, that is not a normal tire chain territory. You do the best you can to shoot a load of chains down there, and then some of the jobbers down there will get excited about the next season coming, and they will order about $5,000 or $10,000 worth of chain and they don't sell a chain for the next five years, and you are in the doghouse with that jobber (1067-1068).

There are conditions besides snow and ice that affect 2276
the demand for tire chains. In the oil fields, down in Oklahoma and in Texas, and places like that, where there is activity in oil fields, you have them used in mud. In fact, in the old days, they were actually called mud chains throughout the country. That is of course not true today, because you don't have those mud roads. You have good, paved roads, but in those days the unpaved road was the rule even though the condition of the roads has changed today and they are practically all paved. In those oil fields they are used to advantage throughout the whole year to help in the mud, where they have their trucks in the mud (1068, 1069).

Some of the better organized owners of fleets of cars and trucks are generally beforehanded in buying. The majority are not. We find our jobbers have to carry quite 2277
a large stock of truck chains to take care of the situation, the short condition of the truckers who do not anticipate their needs. Such companies as Standard Oil, as an illustration, of course, they have it figured out scientifically and they order so many chains each season (1069).

As to the desirability or undesirability of the selling method that is used on tire chains—f.o.b. mill with full

freight allowed—in the light of fluctuations in the weather, I couldn't say that it has any particular bearing on it. The whole idea of that "freight allowed" business is so that we don't have to worry about what the freight rate is from every producing point to every consuming point in the country. The weather hasn't any bearing that I can see. There is a standard for price of tire chains and we solicit on that all over the country, and the weather hasn't anything to do with it at all (1069, 1070).

"Q. Well, now, if you had to sell your tire chains f.o.b. York, Pennsylvania, without equalizing freight at any other point and without meeting competition outside that territory, will you state what, if any, effect that might have on
2279 your tire chain business? That is, if they could not get through to that territory on an f.o.b. basis, what effect would that have on your tire chain business? A. Oh, well, there wouldn't be enough tire chains consumed or required in that area served by York as a territory which would justify even one of the plants there. There are three plants in York and there wouldn't be enough consumption—" (1070).

These three plants are McKay, American and International Chain Company. If we had to sell on that basis, f.o.b. York with no freight equalization, that would modify my previous statement, of course, in that McKay chains would be sold at a premium of about 5 percent or perhaps a little greater than that. You remember, they are already
2280 selling on that basis, and if they were sold on the other basis, then they would have the advantage of the additional discount, plus the freight situation, and I would say we would lose the biggest part of our business (1070).

In describing that territory geographically you would have to take into consideration the fact that there are manufacturers located in Buffalo, New York; Newark, New Jersey; Cleveland, Ohio. We would be circumscribed just as soon as we got in an area where our freight rate exceeded

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to any reasonable degree the freight rates of the other producers. And certainly, in the Middle West, Chicago and St. Louis, wherever there were manufacturers, we would be away out of line. We could sell in New England as well as anybody else. There is one small manufacturer up there that would not cause a great deal of difficulty unless he considerably expanded his activity and operation. That is St. Pierre. I mentioned that we had one at Newark, New Jersey (1070, 1071).

The freight from Newark to New England points would be slightly less than the freight from York—not enough to permit Pyrene to take all of our customers away from us. I believe they would take some (1071).

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As to whether we would be able to sell on the straight f.o.b. basis, with no freight equalization up in Upper New York State and Central New York State, Columbus-McKinnon would have the edge on us. They are at Tonawanda. Then there is Hammond, Indiana. S. J. Taylor Chain Company is there. As to Ohio, we have a very active competitor in the form of the Cleveland Chain Company in Cleveland, Ohio; plus Hodell. There are two of them in Cleveland (1071, 1072).

In the South, it depends on what part we are talking about, and of course there isn't a great deal of business in the South except as resulting from these sporadic weather conditions I described. They used a great many chains in the South years ago as mud or sand chains, but that is not true any more. They only buy them when they have these unusual storms. You couldn't sell in the Deep South. You wouldn't sell a chain in Florida under any circumstances (1072).

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As to selling in the Middle West on the straight f.o.b. York basis, you have the condition that you meet up with the Cleveland manufacturers and the ones like Western Chain, Chicago; Taylor Chain Company at Hammond, Indiana, and they would have an advantage in freight rate.

It is equally true as to the Far West as far as freight differential goes (1072, 1073).

We sell chain in every place in the United States where chain is bought and sold, including the Massachusetts, Newark, Tonawanda, Cleveland, Chicago and Hammond, Indiana areas. We compete with the manufacturers that we have named in the sale of tire chains. We now sell in New England, Ohio, Middle West, New York State, and Far West (1073).

As to the effect upon our welded chain business of having to sell welded chain f.o.b. York without any freight equalization, that would be worse than tire chains because there,
2285 as I said before, they cut throats for only one-half of one percent, and so you can readily see what our competitors would do if they had a freight advantage on us. We would be circumscribed by the area in which our freight rate was equal to or greater than other producers (1074).

The same thing would apply as to weldless chain. There is not enough volume in the territory covered there at York on welded or weldless chain to take care of our plant. There is one plant, other than ours in York, making welded and weldless chain that I am positive and definite about. That is the American Chain Company. Whether International has any machines for making it, I don't know (1074).

"Q. You are talking about welded now or weldless? A. You asked——

"Q. I meant both. Take welded and weldless. A. Well,
2286 welded, the American Chain Company; International" (1074, 1075).

We put in our plant in York in 1919. We were then known as U. S. Chain and Forging Company. Prior to that time the McKay Company had no plant. There was a James McKay Company plant located at McKees Rocks, Pennsylvania. As to the other company involved in amalgamating, there was National Chain Company of Marietta; the Hayden-Corbitt Chain Company. They had plants

at Columbus, Ohio and Huntington, West Virginia. These plants were subsequently closed (1075).

As to why we selected York as the site for a new plant, I am being asked in the face of my competitors. An honest confession is good for the soul. I said that I have been general manager of the Standard Chain Company. They were acquired by the American Chain Company in 1916. I knew all the boys in their organization. I was with them in the development, during the development of the electric welding process which was the backbone of the York plant. So, when the McKay Company, after the dream reached that point, decided to build a plant, they left it up to me as to where would be the most logical place, the most intel- 2288
ligent thing to do in the matter of locating the plant, where would be the best place for the plant in the United States (1075, 1076).

There was only one answer—York. And the reasons are these: First, because of the know-how that was there. In York there was know-how, the men knew how to make all the tools and how to design and how to build the machinery and how to keep it operating and how to run it as it should be run, efficiently. Second, York, at that time, and this you must take my word for, unless you want to check up on some facts and figures, York was recognized as one of the finest labor markets in the United States, both from the viewpoint of the caliber of the workmen there, their ability as mechanics, their application to the job at hand, their pride of accomplishment and—I don't 2289
want to forget this last; I want to put it in to complete the picture—and the low rate of remuneration for which they were willing to sell those marvelous services. The net result of that was that we decided to put our plant in York. And, of course, I, in carrying out that idea, took all of the American Chain Company's foremen, and quite a few of their workmen, so that when I started with brand-new machinery, I was taking advantage of what things I had

taken away with me from the American Chain Company, plus some ideas that they did not have, and we started off, you might say, where they wound up; started off with a brand-new plant with the most modern equipment in the world and the finest workmen. I believe that this is the perfect justification for having put our plant in York (1076, 1077).

As to giving consideration to the source of supply of raw materials, at that time the supplies of raw materials were largely coming from the Pittsburgh District. We did not then have those big, tremendous plants in other parts of the country like we have today. The rod and wire,
2291 the components that went into the chain. That came out largely from and was made in Pittsburgh (1077).

The freight rates from Pittsburgh to York on steel then were about a third of what they are today. We did not take into consideration the location in York from the standpoint of its nearness to the market where the products might be sold. We did not take that into consideration at all. It was purely because of the reasons that I just recited. I might add to that. As to the freight rates for the raw materials, I answered that they were about a third of what they are today. Of course, the price of steel in those days was f.o.b. Pittsburgh. It didn't make any difference where you were, you were going to have to buy your raw material on the Pittsburgh plus basis (1077, 1078).

As to the size of our plant and how much it would cost
2292 to duplicate a plant like that today, well—we started out with 40 acres of ground, about 10 acres of which were sold. We have about 30 acres of ground. The main building is 150 feet wide by 800 feet long. We have half a dozen supplementary buildings, of course; the hardening building and the boiler plant and the electrode plant, and so forth. I would say, considering today's reproduction costs—and this is just my approximate estimate—counting the plant, the buildings and the machinery therein, it would be about $5,000,000 (1078, 1079).

That is a one-story building. As to the number of our employees, we give that information to quite a few government agencies, although we do not as a rule brag about them to our competitors, because we don't want them to know how efficient we are. I might tell you that we have employed as high as 1,200 people in the plant at York (1079).

I think that York is kind of lousy, kind of bad as a location from the standpoint of a market if we had to sell f.o.b. mill and there were no freight equalization. As to the cost to move that plant to a better location from that standpoint, the first thing you would have to do is to provide the building. And today, on today's building costs, 2294
it would cost you perhaps pretty close to $1,000,000 to duplicate the buildings, on today's market in construction cost. The moving of equipment and the reinstalling of it would cost you from $100,000 to $200,000, if you use exactly the same equipment (1079).

Examination by Trial Examiner Ballinger.

The $1,000,000 does not take into consideration the purchase of the land. I have not given that a thought because we have this 40 acres. When we got it, we got the 40 acres at York for $30,000. I don't know what it is worth today. We were talking about the reproduction value of the building itself. I forgot about the land. We were also talking about removal. Frankly, we could probably get 2295
from the Chamber of Commerce some place, if we wanted to locate there and wanted the land, they would probably be glad to give us the land (1080).

Direct examination by Mr. Kittelle resumed:

As to the labor situation in York compared to the earlier days, it's terrible. The only thing I couldn't foresee. We

are CIO-ized to the "nth" degree. I had it in mind in answering about how many employees we had. We just simply have to use our ingenuity and ability to design and improve the efficiency of our equipment to offset the inefficiency of our employees. We no longer have that pride in accomplishment there in York. There are two schools of thought as to the degree of skill required in the manufacture of chain nowadays. Some of the competitors will tell you it is a very difficult thing. I will say "No." We make the machinery so efficient we can train an operator without any trouble if he is disposed at all to do a fair job for us (1080, 1081).

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I was one of the original founders of the Chain Institute. I have attended meetings of the Institute quite regularly, not all of them, of course. I have held several offices in the Chain Institute—President, and at the present moment Vice President (1081).

I was Secretary of the Code Authority during the N. R. A. period. I may possibly have missed one or two of the meetings of the Code Authority, but I doubt it. I think I attended them all (1081).

* * * * * *

After the N. R. A. expired, I attended meetings of the Chain Institute. As to generally what was discussed at those meetings from the period of the expiration of N. R. A. up to the recent war, it is my recollection that after N. 2298 R. A. was declared unconstitutional by the Supreme Court we received a communication from N. R. A., I think from Donald Richberg or Hugh Johnson, and it was publicized at that time, to the effect that we continue the good things that had been set up in our codes, the codes for fair practices and minimum labor wages and so forth and so on. The communication I refer to is Respondent's Exhibit No. 4. We received one of these from the Code Authority and

perhaps we all got copies of it. It also was printed in the newspapers (1089, 1090).

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The statement referred to in the second line of the Whereas clause on page 2 of Commission's Exhibit 252 (a copy of the minutes of the meeting of the chain manufacturing industry at Buffalo, New York, June 10 to 12, inclusive, 1935) is the statement contained in Respondents' Exhibit 4. I attended that meeting (1090, 1091).

The "handmade chain manufacturers" (referred to on page 3 of Commission's Exhibit 252, the minutes of the meeting of the Chain Manufacturing Industry, June 10 to 12, inclusive, 1935) were a group of manufacturers who 2300
made this old-fashioned fire-welded chain that I described—stud link anchor chain. I am "Mr. F. A. Bond" referred to in those minutes. Mr. J. E. Seitz referred to in the minutes is a representative of the American Chain Company. L. B. Powell referred to in the minutes was a representative of Columbus-McKinnon. The "recommendations for the adoption of a freight rate for each state" referred to in the minutes were, frankly, I think, a lot of hooey. I don't think anything was done at all about it. It was probably put in there just to satisfy some of these handmade chain manufacturers that had ideas on how to sell that particular type of chain that they manufactured and were especially interested in (1093, 1094).

Before that meeting, as I described before on the anchor 2301
chain, as near as I can determine, chain was sold on the basis of cost plus a reasonable profit, if any, plus the freight to destination.

Examination by Trial Examiner Ballinger:

It was sold only upon specific order. The dredge chain portion which was a standard item appears on their published price list as sold f.o.b. Pittsburgh basis.

Direct examination by Mr. Kittelle resumed:

According to the minutes, I was put on a committee to study this matter. I don't think we had a study. I don't think anything was done about it at all. It didn't make any sense in the first place, and I don't think we did anything in the committee except to table it and forget it. It died in committee (1094).

As to the subjects of discussion at the Institute meetings during this period of time from the expiration of N. R. A. up to the beginning of the present war, I think I would confirm what Mr. Steinhauer said here, that during the
2303 actual official meetings of the Chain Institute all the activities were fully disclosed in the minutes of the meetings. There were discussions at the time of the meetings, but not at the official meetings. I would say a good deal of it was calling each other names about cutting prices (1095).

"Q. Well, what would be said? Can you describe the type of conversations that were had?

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"A. Well, frankly, you know how you do at these meetings. You hear a lot of tripe and a lot of crap and red tape which they put through, and they put on a lot of rigamarole and put you on these committees doing a lot of different things. A lot of it, too, has been very constructive, and I have been very active, and I spent a lot
2304 of time doing things I thought beneficial not only to my company but to the industry as a whole and of benefit ultimately for the good of the country as a whole.

"But, after we get rid of a lot of this stuff, maybe while we are at lunch or adjourning for a drink or something, then we start talking. Maybe somebody will say to you, 'You so-and-so Son of a B., what did you do down at Bill Jones'?' And you will say, 'What did I do?' Well, he'd say, 'You give them some extras.' And then somebody calls somebody a liar and so forth, and then maybe he would

say, 'Well, I have got the evidence that you did, and you are a liar,' and then you would get into a fight with this fellow, and first thing you know, somebody else would come up and listen to the conversation, and then there would be six of them there, and they would be picking on you—I don't mean picking on me, but picking on these price cutters, you understand.

"So, well, maybe by that time they had three or four drinks and the thing begins to get a little tougher, and the drinks loosen up some tongues—of course, I don't drink, you understand now, gentlemen, therefore I was always in perfect control of my vocal cords, and I have a marvelous vocabulary, I can assure you, when it comes to 2306
calling names, and it has been tested by every member of the Institute, and when I call a guy a dirty, low kind of a so-and-so price cutter, he knows he has been called a price cutter. • • •

"I will be frank, and if you want to crucify me, I will add this: I would tell him further that if he didn't stop these damn price cuttings I would show him how to cut prices, and many times I did cut them, and when I cut a price, and if it was your price I was cutting, take it from me, brother, you knew your price had been cut.

"I could go on and on and on—but I want to say that when any two businessmen get together, whether it is a Chain Institute meeting or a Bible class meeting, if they happen to belong to the same industry, just as soon as the prayers have been said, they start talking about the 2307
conditions in the industry, and it is bound definitely to gravitate, that talk, to the price structure in the industry. What else is there to talk about? And a guy like me, that doesn't drink or get high and go to the bar—why, of course I had to defend myself in some other fashion than getting drunk and forgetting it is there anything else you want me to tell you now?

"Q. Is that the general sum and substance of these conversations that would be had? A. Well, the ones off the record would be largely that, unless there were periods when there wasn't any particular price cutting, then they would go out and play golf and be gentlemen and have a good time; go up to Hershey, Pennsylvania, for instance, where they had ball games, and that kind of stuff" (1095-1098).

In these discussions there was no discussion of these methods of selling welded and weldless chain and the freight equalization on that chain and the method of selling tire chains f.o.b. plant with freight allowed, unless somebody
2309 in addition to a ridiculous discount—and some of those percentages were ridiculous—if somebody might add the freight on top of it, somebody then might raise hell for cutting the prices to that degree, cutting the price by allowing freight, that is (1098).

For instance, allowing freight on welded and weldless chain when they were supposed to be selling f.o.b.; selling f.o.b. and allowing the freight regardless of what it might be. If that was discussed it would be taken as price cutting particularly. And we would discuss that, when they were supposed to sell at a certain price (1098, 1099).

"Q. What do you mean by that? A. Well, the price they were supposed to sell at according to their printed price list" (1099).

I knew Mr. Irving S. Paul, who is now dead and who was
2310 the first Commissioner or whatever you used to call them of the Code Authority. I also know Mr. Dennis Merriman.

"Q. Now, did Mr. Paul or Mr. Merriman ever say anything to you about what could or could not be discussed by competitors? A. Oh, yes, there were lectures to us all the time.

"Q. What did they say? A. Well, frankly, they would tell us that we could not get together and fix prices or anything; that we could not discuss what we were going to

do in future, anything of that kind of matters, on the economics of it, or the right way to do business, and so forth and so on; talking about the prices that a fellow had cut last year, if he had cut them. You couldn't do that in open meetings, talk about fixing prices.

"Q. Did he say anything to you about discussing past transactions? A. Oh, yes, my recollection is quite firm that in that respect they all told us it was perfectly proper and legal to discuss past transactions, even to the extent of sending in copies of your invoices, and so forth, to the Institute" (1099, 1100).

As to the time of these meetings at which names were called and accusations of price cutting made, you have 2312
read in the record that the Institute was organized in 1933. That is when it would have started. As to how long it has gone on—hell, it isn't finished yet. I might take that back, because I think I previously said that from about 1940 and definitely from 1941 there has been no occasion for calling each other names because we are all more busy than we can take care of on the demand, and that automatically clears up the price situation (1100, 1101).

When these conversations had reached the point in the discussion where maybe four or five people would begin to call each other cuss words, some cockeyed fool would go back and cut the price further the next day. These conversations would not cause prices to go up afterwards. Some fellow would find out something that was going on that he had not caught up on, and the next day he would go back 2313
and take advantage of it. The net result of this was that they all finally landed in the gutter; we got the price so low we could get in the bread line (1101, 1102).

We had these discussions to get it off our chests. Brother, if I got anything "agin" you and I meet you any place, I tell you about it. I have been accused once or twice of cutting a price. As to what I said, it depended on the circumstances. Sometimes I would try to wiggle out if I

could and if I got caught in a corner I would say, "You're damn tooting I am and, brother, you ain't seen nothing yet" (1102).

As to whether any of these people ever asked me to "cut it out," that is one of those cases where I couldn't say "yes" and I couldn't say "no." The Institute could raise hell with a man, the idea is they could raise hell with him if he didn't quit something they wanted him to cut out.*

I never told anybody that I would "cut it out." It is barely possible that some persons told me that they would cut it out, the price cutting that I was complaining about. I wouldn't have believed them anyway, though. They didn't
2315 cut it out until they were taught a lesson (1102, 1103).

When I finished one of these discussions and left, the only obligation I felt about my prices was to go home and cut them still further, to get even with somebody. That was not an obligation that I had with somebody else. Maybe I found out something that I didn't know before, at the meeting. I would go and I would listen to all of this haranguing, and I would take advantage, of course. Bear in mind, when the other guy is in the gutter, I am in the gutter too, I don't keep my price up. I am forced to do what the other man is doing too (1103).

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As to the question of how my company would go about making a change in its published prices and published
2316 discounts for the period we were discussing, particularly from 1935 to 1940 or 1941, I would say invariably the American Chain Company would bring out a revised price

* It was later stipulated that if Mr. Frank A. Bond were recalled as a witness for the respondents he would testify that the reporter mistook him and that, in lieu of the above-noted sentence as it now appears, he actually testified as follows: "They sure could raise hell with a man, the idea is they could raise hell with him if he didn't quit something they wanted him to do" (2449-2451).

list either up or down, and we would promptly follow with one of our own, copying it identically. It is possible, but I couldn't be positive, that my company has initiated one of these increases in published prices. I think I could safely say that my company initiated one of the declines in published prices. There has been no discussion at or on the occasion of Institute meetings on the subject of declines in published prices prior to these declines. As to why my company would initiate a decline in published prices, I think I testified that it would be perhaps retaliation or vindictiveness (1107, 1108).

Prior to the advances in published prices that took place during the period we are discussing, we would have discussions at or on the occasion of Institute meetings about costs and whether costs were going up or down. We had a cost committee and that would come up every meeting as an item of regular routine order of business, and at different times we discussed costs of certain specific items (1108, 1109). 2318

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No representative of American Chain & Cable Company stated on any of those occasions that they were going to increase their published prices. Of course, there was not always an increase in published prices after we discussed rising costs, but sometimes there was. I would first learn about a change in published prices or published discounts on the part of American Chain & Cable Company in two ways. I think I have said that we are a customer of theirs and would get through the mails a copy of their price list, but we would also get them from our friendly jobbers. We would get them first sometimes from one, sometimes the other. That would just depend upon the fashion, I suppose, in which the American Chain Company mailed them out. That company always sent us copies of their published price lists and published discount sheets (1109, 1110). 2319

We eventually got copies of the published price lists and published discount sheets of all other chain manufacturers. We would get them in the same way—some of the manufacturers would mail them to us; we would pick them up through our jobbing friends; our salesmen would pick them up and mail them to us (1110, 1111).

We would send copies of our published price lists and published discount sheets to all our customers and all our competitors. We would send them to our competitors at about the same time we would mail them to our jobbers (1111).

As to what the other manufacturers might do after we
2321 received American's price list, I can answer that in this way—we would bring out our price list and eventually the rest of the industry would also bring out a price list comparable to American's, of which we eventually would get hold of a copy. It might be a matter of several weeks before that would take place (1111, 1112).

In addition to purchasing certain items from American Chain & Cable Company, we have occasionally bought some items from Columbus-McKinnon Chain Company. We also sell some of our chain and chain products to some of our competitors (1112).

* * * * * * *

I have had conversations with Mr. Dennis Merriman with regard to past transactions. To be frank about the nature
2322 of those conversations there would be times when, in order to satisfy somebody other than myself in our organization, I might be tempted to ask him to try to find out whether a certain rumor was true or not in respect to a cut price on some sale to some one of our customers. He would then supposedly check into it and ask the supposed price cutter if he had done it, and then perhaps he would tell me whether they said yes or no. As far as I was concerned, nothing further would be said. Mr. Merriman has called and asked me to give him information on some of our past

transactions. I would either tell him the truth or tell him it was none of his business. Mostly I would tell him it was none of his business. He never asked me to stop price cutting or cut out doing something; his query would be as to whether I had done a certain specific thing. Sometimes he would tell me the name of the person who had inquired of him and wanted this information and sometimes he wouldn't. When he wouldn't, I would tell him it was none of his damn business. I did not always give him the information when he told me the name of the competitor that had inquired. It depended on the circumstances. You know, if I may be permitted to say it, we are not going to let Dennis Merriman go and tell my secrets 2324
to these chiselers that might ask a question just to find out what price I was giving somebody (1115, 1117).

As for my purpose in calling Mr. Merriman and asking him for information about what a competitor was doing, we have one salesman down South who runs into perhaps more price cutting than any other man we have got. He knows Dennis Merriman and he somehow had the idea that I could take up with Mr. Merriman to find the answer to anything he wanted to know, so he would write in and say, "Will you take this up with your friend Merriman and see if Bill Jones cut the price on conveyor chains to George's Supply Company, Savannah, Georgia," and I might in all honesty tell you that I might have replied to him and told him I did ask Mr. Merriman and the answer was yes or no or something of the sort, and I never even approached 2325
Mr. Merriman; it was just to get him off my tail and shut him up (1117).

* * * * * *

As to our cost system and the extent to which we utilized it in determining our published prices for chain, I have testified that we follow the leadership, usually, of the American Chain Company. When they bring out an advance in price, we follow suit. There have been advances

in published prices in the last 15 years when there had been no increases in cost (1144, 1145).

"Q. On what occasions? A. As I have already told you, there are times when the price structure gets so disastrous and so terribly low that something is done about it, somebody had the nerve to decide that they were going to take a chance and try to get a higher price—of course, it is obvious, if you know how business works, that no matter how low the prices get or no matter how high they are, the chiseling always takes place from whatever is supposed to be the price in effect, so that at least a certain amount of the business you get would be benefitted by the publi-
2327 cation of increased prices even under the most demoralized conditions.

"Q. When you say 'supposed to be the price in effect,' what do you mean? Who supposes it? A. Well, I suppose that if a man publishes a price, that that is his price. It is my supposition" (1145).

When our company initiated declines in our published prices, they were not based on declining costs of raw materials or labor or anything. It would be what I would term a levelling out process, the extra discounts and so forth off the record, and deviations from our price list becoming so onerous and so voluminous that it just simply made sense to go ahead and try to correct it (1145, 1146).

For instance, if you had a published price of 33⅓ and a prevailing chiseling price was 33⅓ and a couple of 10's,
2328 you would finally reach the point where it is simpler to do business by coming out with a list saying it is 33⅓ and two 10's, and at least let them start to cheat from there on, at least clear up all that ran up to that point (1146).

When I said that we had published a lower price or larger discounts for purposes of vindictiveness or retaliation, perhaps I didn't mean it just that way. I meant just that they would get me to the point where I would say,

"I am getting tired of meeting all these confidentials and having so many extra-special prices recorded in our pricing department," and I would simply clear the situation up and bring out a discount to that effect (1146).

It is standard practice for a buyer to play one manufacturer against another for a lower price. I can recall hundreds of specific illustrations. This is what happens. I would say that in a demoralized market 90 per cent of time you fall for it and concede the lower price. In a rising market, you are just a little cannier about it and perhaps have to be shown (1146, 1147).

The McKay Company didn't exactly pick the McKees Rocks plant location. That was the James McKay Company which became a part of the U. S. Chain and Forging 2330
Company which is now the McKay Company, and their plant was located at McKees Rocks. It is probably the largest fire welding plant in the United States. At the time the U. S. Chain and Forging Company was formed in 1919 we had some other fire welding plants. I previously testified that we had them in Marietta, Ohio; Columbus, Ohio, and Huntington, West Virginia. When we closed those down we kept the McKees Rocks plant instead of one of the others because, first, it was the largest. It also covered the widest variety or range of sizes. It could make from the smallest size up to the large-sized anchor chain, and it was in the Pittsburgh district. At that time, as at the present, we get our steel from the Pittsburgh district (1147, 1148).

2331

We would save the freight on the raw material from Pittsburgh to Marietta, Columbus and Huntington by producing the chain at McKees Rocks, which is Pittsburgh district (1148).

As to our freedom to change our level of prices whenever we wish, I must take exception to that or rather clarify that. Certainly, I am free, but I have to be awfully careful about raising my prices. In my opinion, it takes the largest

segment of the industry to come out with an advance in price. I can reduce a price any time, understand. It does not matter how big the other fellow is, if I cut my prices he has to meet my lower level, but he does not have to meet my higher price and it would be rather disastrous if the McKay Company would come out with an advance and the American Chain Company didn't follow. It would make us look rather foolish (1148).

I have testified that we have initiated declines in published prices. The reaction of buyers in a generally declining market is that they don't like it any better than we do. They hole up, or rather, quit buying, naturally, play
2333 it safe. They quit buying when the market is going down because they don't want to be caught with any more inventory than they can help. If the price keeps going down, naturally they try to buy their current needs so as not to take any more and have a loss on inventory. As to the effect of this holding back of the buyers on the declining market upon the rapidity of the decline, the less business there is available, the more price cutting there is, always trying to get your share to keep your factory running a little better than the other fellow (1149).

When the market is going up the tendency of buyers would be just the reverse, as it would be of the manufacturers. If there is going to be an advance, of course, they try to get under cover for fear there will be another advance, and principally they try to get you to take orders
2334 at the old price. The effect of this upon the rapidity with which the market advances is that the more buying there is, the more stability there is, firmness, to a price market (1149, 1150).

* * * * * * *

We send monthly tonnage statistics of our company's sales to the Chain Institute. Annually we send the total sales value to them, upon which the assessment of the individual companies is predicated for the following year.

By assessment I mean the dues. These monthly tonnage figures are broken down by types of chain—about a half dozen classifications. The Institute sends back to us the consolidated tonnage figures reported by all members of the Institute, and then they show your percentage of that total and the present report shows the increase of this month as against the preceding month, and this month as against the same month of last year, and a final percentage figure showing what our percentage has been for the past 12 months. They do not show the tonnage of any of our competitors, but do show the tonnage of the total industry (1152, 1153).

* * * * * * 2336

As to the factors which account for there being two different methods of selling welded chain and weldless chain, the former f.o.b. Pittsburgh and the latter f.o.b. York with an equalized freight with Cleveland, Bridgeport, and so forth, I'll try to explain it again. The welded chain, I think I have told you a half a dozen times, is sold on an f.o.b. Pittsburgh basis because that is the way we have always sold it. The weldless chain is made by only a few manufacturers and as they originally came into being they had to compete with each other. Let us assume that there were just originally two locations, say Bridgeport and Cleveland. They just had to do something if they wanted to sell in the other fellow's territory, so they would equalize freight with each other. Then, some other point would 2337
come into being, such as York, Cincinnati, whatever it may be. That would be added to the scheme of things so that when we got into the picture there were the four basing points (1156, 1157).

When I was with the Standard Chain Company back in the early years, in the early 1900's, to my knowledge there was not any manufacturer of welded chain then who also made weldless chain. There were just the Oneida

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Community Company, the Bridgeport Chain Company and the Cleveland Galvanizing Company, and they did not make welded chain. They made weldless chain (1157).

* * * * * *

I would say that any given item of welded chain when made by two different manufacturers is made substantially out of the same basic materials. The methods of manufacture are substantially the same. There are some slight differences in their equipment, but the fundamentals are the same (1159).

The materials that weldless chain is made from are practically the same. The methods of manufacture are the
2339 same because weldless chain is distinctly an automatic machine operation and all manufacturers would use substantially the same type of machines for making them (1159, 1160).

The materials that tire chain is made from are generally the same, perhaps not exactly the same, but generally so. The process, the machinery that is used on tire chains, is practically the same among manufacturers (1160).

Buyers of chain are very well informed as to prices at which they can buy from various manufacturers. They are kept informed by the traveling ambassadors of all the chain companies, as well as Biddle and R. K. Corder and the so-called syndicate buyers which have as part of their service that they keep their clients posted as to what is
2340 going on pricewise in a lot of lines, one of which is chain. They post their clients on not only the published prices which the buyer himself already knows because he has copies of the price list, but also they go into the question of the extra, off-list discounts (1160, 1161).

The McKay Company's overhead cost on its chain business is relatively high (1161).

We have had experience with buyers requesting delivered prices on various types of chain. You get lots of inquiries where a man will ask you what is the price of such and such

an item delivered to his place of business, Georgia, for instance. Buyers have not expressed to me any preference for either delivered prices or f.o.b. mill prices. They accept your published prices as a matter of course, but if they are interested in the price on any specific item, in many cases for their own convenience they ask you to quote delivered (1162).

We learn of a competitor's sale or offer at a cut price below his published prices in two ways. If it happens to be one of the so-called pet accounts, he may call you up on the telephone and tip you off that something is taking place that perhaps you didn't know, but you usually get it through your salesman who contacts the trade, and he is given that as a reason for not getting any business, or is asked to meet the price, and he then advises you of it. It would be ridiculous if we ever got it first from a competitor (1162, 1163). 2342

"Trial Examiner Ballinger: Well, do you or do you not?

"The Witness: Oh, no, sir" (1163).

* * * * * *

Direct examination by Mr. Kittelle resumed.

I would say that American Chain Company to the best of my knowledge and belief is the largest manufacturer of welded chain, weldless chain and tire chains (1164).

There are 13 cross chains on a standard tire chain 600x16 that fits the Ford and ordinary type cars. There would be 8 or 9 cross chains on a substandard tire chain of the same size depending on who was making it (1164). 2343

* * * * * *

I am familiar with the term "cold shuts". It is a little forging that is used to connect two lengths of chain together. It is not a little single link like a link out of a

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chain. It doesn't look like a link of chain. It is a little sort of a three-cornered affair with an eye in one end of it forged in, and the other end of the material would be forced down in that eye, and then riveted after you have joined two links of chain into it to make a piece of chain continuous (1167).

A hook in the chain business is something that you put on the end of a piece of chain and if you have been on a farm, did you ever see a farmer using a log chain? Well, he has what they call a grab hook on one end, which is a hook with a very narrow throat with a sharp edge in the throat that engages any individual link and the heel of
2345 the next abutting link would hit up against those knife edges and thus form a stoppage or enable you to make a loop. On the other end you would have what they call a slip hook which is a hook with a wide opening and a wide circular flare that permits you to slide it up and down the other piece of chain so that you can make a hitch (1168).

I would say that I received, about the time it was issued, a copy of the announcement from Columbus-McKinnon Chain Corporation at Tonawanda, New York, dated January 19, 1940, to the trade on the subject of slip hooks, grab hooks and cold shuts containing certain prices and discounts on these products, which is Commission's Exhibit No. 274. I would be frank and say I can't specifically remember it, but I would say yes, I would have received it. I would have received it from Columbus-McKinnon Chain
2346 Company (1168).

We manufactured these cold shuts and hooks. At the time of the announcement, the McKay Company had been selling cold shuts and hooks for many, many years f.o.b. Pittsburgh. There are several of the chain manufacturers who make cold shuts and hooks. Then there are also drop forge manufacturers who do not manufacture chain who make those particular items. Some chain manufacturers buy cold shuts and hooks from drop forging manufacturers. We do it ourselves at times (1169).

"Mr. Kittelle: Let the record show that the number of Commission Exhibit 274 which I mentioned in connection with that Columbus-McKinnon announcement does not coincide with the number which Mr. Steinhauer has as the exhibit number for that document" (1170).

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"Mr. Kittelle: Now, for the record I will state that this Respondent's Exhibit 8 for Identification is the document which I previously referred to erroneously as Commissioner's Exhibit 274, and I now offer it in evidence" (1171).

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"Trial Examiner Ballinger: Respondent's Exhibit 8 for Identification is admitted in evidence" (1171).

Direct Examination by Mr. Kittelle resumed.

To my knowledge, I will admit having received a copy of Commission's Exhibit 136-A to 136-H, inclusive, except for Commission's Exhibit 136-B which is a Sales Bulletin No. Y-8-422 which seems to be an intercompany document. I received copies of these papers (136-A, a letter from the American Chain and Cable Company to the trade dated July 22, 1940; and 136-C-H, price lists and discount sheets of the American Chain and Cable Company, all bearing date of July 22, 1940) at or about the time of the date of them (1172, 1173). 2349

"Mr. Kittelle: Just for the record, I would like to note that Commission's Exhibit 136-C, which is a part of this group of exhibits, is a discount sheet effective July 22, 1940, of the American Chain and Cable Company on welded chain and fittings. It contains a list of various welded chain items and the discounts therefrom, with the notation that all of these are sold f.o.b.

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Pittsburgh basis. Then, below that, it contains discounts for slip and grab hooks and cold shuts, and as to these it states: Freight allowed to points East of the Rocky Mountains on shipments of 100 pounds or more 50 and 10 percent; freight allowed to points West of the Rocky Mountains on shipments of 100 pounds or more 50 percent" (1173).

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Direct examination by Mr. Kittelle resumed.

Respondents' Exhibit 9-A is a McKay Company welded price list No. 115, effective July 26, 1940. Respondents'
2351 Exhibit 9-B is a McKay Company distributor's discount sheet, No. 16, applying to Price List No. 115. Respondents' Exhibit 9-C is a McKay Company discount sheet, No. 16-EG, applying to Price List No. 115 and as a matter of information, this is a discount sheet applying to so-called "consumers" who made or might make purchases direct from the manufacturer (1174).

I have described the discount sheet, No. 16-EG, which is Respondents' Exhibit 9-C as being to consumers. Distributors' discount sheet, No. 16 which is Respondents' Exhibit 9-B, is the discount to the distributor which is to the jobber or wholesaler.

"Mr. Kittelle: Now, for the record, I would like to
2352 note that this distributors' discount sheet, both of them in fact, Respondents' Exhibit 9-B and 9-C, contain a list of welded chain items, effective July 26, 1940, and the greatest number of items on the sheet, at the top of the sheet, are sold f.o.b. Pittsburgh basis, and under that it says: Cold shuts No. 1 and No. 2, slip and grab shooks, freight allowed to points east of the Rocky Mountains on shipments of 100 pounds or more 50 and 10 percent, freight allowed to points west of the Rocky

Mountains on shipments of 100 pounds or more 50 percent. That is on Respondents' Exhibit 9-B which we had identified as the sheet applicable to jobbers.

"Respondents' Exhibit 9-C, which is the sheet applicable to consumers, is the same except that the discounts are less: The discount is only 33⅓ percent there instead of 50" (1175, 1176).

Examination by Trial Examiner Ballinger.

Where it refers to 50 and 10 percent I can explain that. We will say that the list price on cold shuts or slip hooks or grab hooks is $10 for 100 pounds. Then, the 50 and 2354
10 means that you would take off 50 percent off that, which would make it $5, and then you would take 10 percent off the remaining, which would give you $4.50 (1176).

Direct examination by Mr. Kittelle resumed.

Prior to the time we issued this price list, which is Respondents' Exhibit 9-A, 9-B and 9-C, we sold cold shuts and hooks f.o.b. Pittsburgh. As to why we changed to this basis on this new price list, if you will let me see that American price list again—I would venture that they brought out a price list which we met, where they shipped on delivered basis. That was our reason for making the change. These drop forging manufacturers were selling their products delivered at that time (1176, 1177).

2355

Respondents' Exhibit 10 is a sales bulletin of the McKay Company, No. 559, dated February 18, 1941, on the subject of grab hooks, slip hooks and cold shuts. That was sent out by our company from our sales department to representatives of the sales department. It is a company bulletin. It did not go out to the trade. That particular form of announcement never goes out to the trade (1177, 1178).

The red-pencil notation on Respondents' Exhibit 10 in evidence which reads "Re No. 402" was put on there by me. It is some reference to Federal Trade Commission Exhibit No. 402. I put it on last week (1178).

"Mr. Kittelle: Now, for the record, I would like to note that Respondents' Exhibit No. 10 is Bulletin No. 559 of the McKay Company dated February 18, 1941, and says: 'We have just sent postal card notice to the Jobbing trade only, instructing them to change our discount on these products', and the subject of the memorandum is stated to be grab hooks, slip hooks and cold
2357 shuts, " * * to 50 percent to all destinations. F.O.B. Pittsburgh, Pennsylvania.'

"The memorandum further states:

"'Our own forging capacity is pretty well filled up, producing what we need as attachments for chain, and deliveries are getting so difficult from other sources that we definitely are not interested in orders for these items at any better prices than above.

"'We are getting a new printing of discount sheets No. 16 with this correction and will mail you copies in a few days but it is not being mailed to the trade.

"'We have not notified Consumers as their requirements are very limited but our standard discount to them as a correction for EG-16 will be—33⅓ percent to all destinations. F.O.B. Pittsburgh, Pennsylvania'"
2358 (1178; 1179).

Direct examination by Mr. Kittelle resumed.

As to why we went back to f.o.b. Pittsburgh, Pennsylvania on these cold shuts and hooks in 1941, from what appears in Respondents' Exhibit 10, it looks as though we just possibly made up our mind not to sell them on a delivery basis, that we were not going to sell them that way, deliv-

ered; but there is also a possibility someone else conceived that thought before we did, and we were following somebody else's lead (1179, 1180).

"Mr. Kittelle: Just so the record may be clear at this point, I would like to make note of the fact that Federal Trade Commission Exhibit No. 448 is an announcement to the trade of the Western Chain Products Company dated February 24, 1941, to the effect that cold shuts and hooks and connecting (missing) links are to be sold f.o.b. Pittsburgh, Pensnylvania, with no freight allowed with discount 50 per cent in the case of cold shuts and hooks" (1180).

"Mr. Kittelle: I should perhaps state for the bene- 2360
fit of the record what this exhibit is. Commission's Exhibit No. 402 is a memorandum which contains a statement signed by F. A. Bond and apparently addressed to Mr. W. H. Read, being date of March 18, 1941" (1180).

Direct examination by Mr. Kittelle resumed.

Mr. Read was a salesman for McKay Company. Apparently this is a letter which I wrote to him (1180, 1181).

"Q. Will you please read it? A. 'Now, regarding the price of cold shuts and hooks, I am sorry the office didn't advise you that the rest of the industry raised the prices, but they most certainly did—each and every one of them, including the outside manufacturers, who are matching our 2361
discount but are still quoting delivered prices, but the chain industry is going to stand pat on f.o.b. Pittsburgh'" (1181).

As to the basis for my statement that "the chain industry is going to stand pat on f.o.b. Pittsburgh", undoubtedly, I had received copies of announcements showing where my competitors were selling at f.o.b. Pittsburgh, and I would definitely say that this is what we were going to sell at.

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I had had no discussions with competitors as to whether they were going to do that in further [sic.] or whether they were not (1181).

It involved confusion and difficulty in billing, that is, the billing of the welded chain, the grab hooks and the slip hooks on different bases (1182).

The Phoenix Manufacturing Company is a concern that is in the drop forging business and among some of the items they make are slip hooks and grab hooks. They do not manufacture chain. I undoubtedly received a copy of Commission's Exhibit No. 418, which is on the letterhead of the Phoenix Manufacturing Company of Joliet, Illinois, bearing
2363 date of August 5, 1941, addressed to the jobbing trade and which is a notice of price change effective August 5, 1941, on grab hooks, slip hooks and cold shuts. The reason for my answer is because we are customers of theirs; we buy some of those items from them at times (1182).

Respondents' Exhibit 11 is a copy of McKay Company Sales Bulletin No. 559-A dated August 13, 1941, on the subject of grab hooks, slip hooks and cold shuts. It was sent to representatives of the sales department. It did not go out to the trade. It is an intracompany bulletin. The pencil writing which appears upon it I put there just a couple of days ago (1183).

> "Mr. Kittelle: I offer this in evidence, and ask that only the portion which is typed, plus the signature of
> 2364 the man that signed it, be considered an exhibit; and that the pencilled writing at the bottom not be considered a part of the exhibit in evidence" (1184).
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> * * * * * *
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> "Trial Examiner Ballinger: Respondents' Exhibit No. 11 for Identification is admitted in evidence, the pencilled notes appearing thereon not being included in the exhibit" (1184).
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> * * * * * *

"Mr. Kittelle: This announcement or memorandum dated August 13, 1941, from the McKay Company, is on the subject of grab hooks, slip hooks and cold shuts, and states:

"'We have just sent postcard notice to the Jobbing trade only, instructing them to change our discount on these products to—40%—Freight allowed to points East of the Rocky Mountains, on shipments of 100 lbs. or more.

"'30-10%—Freight allowed to points West of the Rocky Mountains, on shipments of 100 lbs. or more.'

"Still reading from this exhibit: 2366

"'This price revision was sponsored by one of the small Mid-west Hook manufacturers and is a good indication that the price structure on these unprofitable items is finally reaching a firm base. We are definitely not interested in orders for these items at any lower price.

"'Discount sheet No. 17 will not be reprinted at this time.

"'Consumers were not notified as their requirements are very limited. Our standard discount to them as correction to EG-17 will be——

"'25%—Freight allowed East of Rocky Mountains, on shipments of 100 lbs. or more.

"'20%—Freight allowed West of Rocky Mountains, on shipments of 100 lbs. or more'" (1184, 1185). 2367

Direct examination by Mr. Kittelle resumed.

I could state the name of the small Mid-west hook manufacturer that is mentioned in Respondents' Exhibit 11. I could state several, but conclude from what I saw a little bit ago that it was Phoenix Manufacturing Company. As

to whether they are a small or large hook manufacturer, that is rather difficult to answer. They might be an awfully large hook manufacturer if they wanted to devote all their working energies to making nothing but hooks. They can make a great many more than the consumption requires (1185, 1186).

I never talked to anybody connected with Phoenix in my life, let alone with regard to this change. I had no discussion with any other drop forging manufacturer concerning it nor with any other chain manufacturer (1186).

2369 "Mr. Kittelle: Just for the record, I might note that Commission's Exhibit No. 447 is a price list of the Western Chain Products Company, or rather an announcement to the trade on grab hooks, slip hooks, and cold shuts, dated August 15, 1941, which states that: Effective immediately, the following discounts will apply on those products east of the Rocky Mountains 40 per cent; west of the Rocky Mountains 30 and 10 per cent; shipments of 100 pounds freight allowed; less than 100 pounds f.o.b. basis Pittsburgh, Pennsylvania" (1186).

Direct examination by Mr. Kittelle resumed.

2370 Our reason for making that change back in August of 1941 to the delivered basis on cold shuts and hooks, obviously from the figures cited in Commission's Exhibit No. 447, is an increase in price. Naturally we try to take advantage of that price, even though we dislike the delivered basis feature of it (1186, 1187).

Cross-examination by Mr. Schriesheim.

I received a copy of the price list published and issued by the American Chain and Cable Company on welded chain and fittings, dated July 22, 1940. We always get copies of those price lists. It possibly might be not entirely correct to say that we then issued a price list incorporating all of

the prices in that price list, which was issued under date of July 26, 1940. We reproduced it to the extent of such items as were listed in our price list (1190, 1191).

"Q. That is right; but you did [sic.] reproduce any common items? A. Yes, sir.

"Q. That you sold? A. Yes, sir.

"Q. And that was your normal practice? A. Yes, sir" (1191).

Our normal practice was to get a price list issued by American from either American or a jobber and on the basis of that price list issue a price list of our own (1191).

As to the removal of these cold shuts and grab hooks from the Pittsburgh basis by American and ourselves, I said 2372
that probably what had happened was that we had followed American, that they had changed from the Pittsburgh basis to this delivered basis and we would copy it, perhaps inadvertently if we didn't intend it—but we copied it. Naturally the reason they took those products from the Pittsburgh basis was to meet competition, the competition of some of these so-called independent drop forge producers on those same items (1192).

As to the reason that cold shuts and grab hooks were put back on an f.o.b. Pittsburgh basis I hazarded a guess in answer to that question from Mr. Kittelle. Probably somebody decided he was going to revert back to the Pittsburgh basis, and it was found out, and similar action was taken.

2373

Examination by Trial Examiner Ballinger.

That is my best judgment.

Cross-examination by Mr. Schrimsher resumed.

I do not recall a specific price list that we followed in that case. I testified that following a price list put out by Phoenix Manufacturing Company on August 5, 1941,

we issued another sales bulletin dated August 13, 1941, and again took these items, cold shuts and grab hooks, off the f.o.b. Pittsburgh basis for selling. As to changes in the method of selling these particular products since that date, it is my recollection that they are still in the present price list on that delivered basis. It would seem to indicate that nobody else has come out with a price list which we followed (1193).

It would be partly true to state that when the companies that I worked for including McKay started into business they thereupon adopted the Pittsburgh-plus basis of selling in the case of welded chain. The McKay Company happened to represent a consolidation of three companies, all
2375 of whom had sold on the f.o.b. Pittsburgh basis and then the United States Chain and Forging Company, or McKay, rather, continued that same method of selling (1193, 1194).

When this plant that I helped set up in York started doing business they sold welded chain on a Pittsburgh plus basis. They started selling weldless chain in 1928 and immediately adopted the multiple or freight equalization system of selling for weldless chain. When we started making tire chains we adopted the universal zone delivered price system, that is one price all over the country in the case of tire chains (1194).

Since the date we adopted these selling methods for these three types of products we have continued to sell on such bases and have never tried any other system of selling (1194).

2376 I testified that as to stud link anchor chains, McKay sells them on the basis of our cost plus a profit, depending on if it is possible to obtain a profit, plus the freight to the point of destination, largely shipbuilding yards or plants, their point of operation, or to New York if it happens to be export. By freight to the point of destination I mean freight from the plant. The freight is the same as that from Pittsburgh because the plant is located at McKees Rocks in the Pittsburgh district (1195).

"Q. That is not true in all cases? A. Well, there may be, if you——" (1195).

Stud link anchor chain is a welded chain. It isn't sold on an f.o.b. Pittsburgh basis because it is a specialty and it is a special line. It is built to order, it is made to order. A shipbuilding company will build a 10,000 ton vessel; that, according to the rules and regulations, will require a certain diameter and length of anchor chain. Some will require it two inches in diameter and, say, 210 fathoms to a cable, and there will be other sizes, larger in diameter and maybe 240 feet to a cable. It all is worked out on some mathematical formula, and you build it to order, and you never publish the prices. It is not something that you 2378
sell to the trade in general at all, you just can't sell it to the trade (1196).

It is not a standard product. Each order might call for different specifications. There are all kinds of requirements and regulations coming into the picture, and all sorts of Bureaus, it might be one of our bureaus and it might be some foreign inspecting bureau, or the American Bureau of Shipping (1196, 1197).

We did quite a volume of business in anchor chain during the war. When the Navy first asked for quotations on it, they would give you a destination, sometimes maybe a dozen or more, and they would ask you to quote delivered prices to these respective destinations or depots. I believe they called them. Later, however, they asked us to quote f.o.b. factory and they were shipped on government bills of lad- 2379
ing. That is a matter of record (1197).

I testified that I had not discussed the Pittsburgh-plus system of selling or any of the other systems of selling involved here with our competitors before my company was founded or since (1198).

"Q. Of course, when you so testified, and I say this because sometimes it was not clear, you spoke for yourself only? A. I am speaking for

"Q. In the matter of discussion with competitors? A. Yes, sir.

"Q. Of your selling systems? A. Yes, sir" (1198).

I am vice president of the McKay Company. For many years I was sales manager. I am now the executive vice president. The sales department operates largely under my guidance and direction. I was not sales manager when the company was founded. I was never sales manager, as such (1198).

As to whether I meant to say that I haven't discussed prices with our competitors, I said that there was no reason at all why I should ever discuss those methods of selling, because they were in my mind and interpretation just his-
2381 torical—just drifted into them. As to discussion of prices, I said frankly I just raised hell with my competitors about the cut prices they made (1199).

I have not been traffic manager of the Chain Institute. There is a misunderstanding about that. I just happened to be chairman of what they called the traffic committee of the Chain Institute. There is a whole bunch of committees—the cost committee, the traffic committee, and the labor relations committee, and what have you. I just happened to be chairman and have been for a long time chairman of the traffic committee. I presume that it would be construed that I had supervision of hiring Mr. Donley to prepare a freight-rate book to use in the Institute. Charles Donley happened to be the traffic counsellor, and still is, of my com-
2382 pany. I was appointed chairman of the traffic committee, and it just seemed logical that I would get my own traffic counsellor to prepare any traffic documents or do any traffic work for the Institute of course, with their approval (1199, 1200).

Donley was employed by the Institute to compile the freight rate book. The book consisted of the freight rates from Pittsburgh to various chain purchasing points in the United States, and perhaps a few other places like the

Panama Canal and places of that sort. The freight rates were for welded chain. The reason that the cover of the freight book says "Welded and Weldless Chain" is because there are certain items or quite a number of items of weldless chains that take the same freight rate as welded chain. The freight rate from Pittsburgh, however, wouldn't be applicable, to weldless chain. It would have no bearing whatsoever (1200, 1201).

"Mr. Steinhauer: It would as far as shipping from Pittsburgh.

"The Witness: But there is no weldless chain shipped from Pittsburgh, Mr. Steinhauer" (1201).

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The freight rates in this freight book compiled by Mr. Donley are designed for shipping purposes in the sense that when you ship material you want to know the freight rate. These are freight rates that I would use if I was shipping material from Pittsburgh. They were correct ICC freight rates, actual freight rates from Pittsburgh at the time that the book was printed and published. Whether they are now or not, I couldn't answer. It would be necessary to ask a freight traffic expert. There have been so many changes in freight rates, I wouldn't know. The book was changed to keep it current for quite a period of time. There would be bulletins correcting any changes in freight rates. I would be disposed to say that it has not been kept up currently or at least I haven't seen any amendments for quite some time (1201, 1202).

2385

The original intention during the NRA was that these freight rates were designed primarily for pricing purposes. As to the reason for which they are using them now, I don't know that they particularly use them. We in our case have a complete file drafted up and kept current and up to date by Donley that is used i our York sales office. Personally, I have one of those old copies in my desk, and if I

want to check a freight rate, I look at it. The freight rate books was disseminated to the members of the Institute by the Institute. They could still get additional copies of it if there are any available. Any changes that are made are disseminated by the Institute. As to whether it is generally true that the freight rate book is used for pricing purposes in selling welded chain, I wouldn't be able to answer that on the part of anybody except myself. I have just recited that we have a very complete file kept up to date practically daily that we use (1202, 1203).

The reason the book was compiled was because in NRA we were supposed to file prices. We were supposed to file
2387 them, as we did, on an f.o.b. Pittsburgh basis, because that was the way our price lists were published. Therefore, to be sure that you complied with the prices that you published in Pittsburgh, you had to have Pittsburgh rates of freight. It seemed like the simplest thing to do was to have one man compile one book and give everybody copies of it, instead of each person getting it from their own individual traffic counsellor or traffic department (1203, 1204).

We have made changes in the freight rate book and disseminated those changes to the members of the Institute long since NRA was declared unconstitutional. The fact that we distributed or disseminated corrections thereto, is no proof that anybody used them. We have no means of telling whether they used them or not. The book was adapted or authorized by the members of the Institute.
2388 The Institute authorized Donley to prepare it. It was used during NRA for pricing purposes. Mr. Donley did the work on the changes later and those changes were disseminated to the members of the Institute by the Institute (1204, 1205).

I testified that McKay started selling weldless chain in 1928, with the qualification that we had, prior to that, sold some lock-link chain which was the type of chain used in the old days as side chain for tire chains. When we started

selling weldless chain, we equalized freight with Bridgeport, Cincinnati, York and Cleveland in our sales. Our plant was located at York. As to whether I testified that there was no phantom freight involved in this freight equalization system used in selling weldless chain, if I so testified I probably tried to reason out here by answering a lot of questions as to what would happen if you shipped from one point to another. But theoretically the man bought the chain at the cheapest freight rate that he could possibly buy from, because we equalized with the factory that was nearest to his point of business. I can't see how any phantom freight would be involved (1205). I did testify that there was no phantom freight involved in my 2390
opinion (1206).

If Peerless out in Winona, Minnesota equalized with Cleveland, Bridgeport and Cincinnati and sold to a customer that's closer to Winona than Cleveland, but equalized with Cleveland, charging the customer the freight from Cleveland which is more in that case than the freight from Winona that would be a case of phantom freight if those facts are correct. I don't know whether that company equalizes freight with those points. I'm not familiar with Peerless' operations in weldless chain (1206).

I did not testify in the case of tire chains that five per cent of the selling price is allowed for freight by our company. Somebody asked me about what the freight amounted to overall, and I said approximately five per cent. As to its computation, we get a monthly record in our profit and 2391
loss statement which shows what everything costs us, and so forth, and of course up there shows all the freight we have to allow. You just simply relate one figure to the other. It fluctuates, of course, where you ship it in any given month. But I said approximately five per cent on an average, and the Examiner, I recall, asked me five per cent of what, and I told him of the selling price (1206, 1207).

I would not offer to submit figures to the Federal Trade Commission such as a copy of one of our monthly statements that would show our freight cost as compared with our total selling price. I would have no authority to do that. I would have to get authority from my company and also from my counsel. As to whether I would try to get such authority, my counsel is right here (1207).

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"Trial Examiner Ballinger.

"In a conference off the record, it is agreed between counsel that sufficient of the records of the respondent
2393 Company would be submitted for examination by counsel for the Commission, counsel prosecuting the complaint to satisfy themselves as to the correct percentage about which the witness has testified.

"Is that substantially correct?

"Mr. Denby: Yes, sir" (1208).

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Cross-examination by Mr. Schrimsher resumed.

As my counsel said, over a period of time, approximately five per cent of the selling price of our tire chains constitues freight allowance. That is my best judgment now. That is an average figure. You couldn't take one month; it wouldn't be fair. Because, some months you might ship
2394 to nearby points and the percentage might be three, and another month if you shipped all to western points it might be six or seven. But my best judgment is it averages about five per cent over a period of time. In the case of a sale to Houston, Texas, for example, the freight might constitute—just to make a guess for comparative purposes—30 per cent (1211).

"Mr. Denby: You wouldn't be apt to make that sale, would you!

"The Witness: Well, sure" (1211).

Cross-examination by Mr. Schrimsher resumed.

As an illustration it is sound to say in the case of a sale to Philadelphia, it would probably constitute considerably less than five per cent. As to the fixing of our base price or list price of tire chain to take care of any sale to any part of the country, I have repeatedly testified here that we don't set the price on tire chains. We just follow (1211, 1212).

I sell at the price that my competitors set up to me to 2396
shoot at, and I have to sell at that price. But, we do set up the list and the discount (1212).

I never read it because it always shows the sales department in a bad light, but the cost accounting department sets up a theoretical price which we should get, which is on the basis if you delivered it all in York. Then they charge against that amount the freight that we actually allow, and those are the figures that we can develop from our records. We generally sell tire chains in all parts of the country (1212).

I didn't say that we were consistently losing money on our sales. You might lose money on shipping to some certain point. But you make it up by shipping to some other point. You have no control of just where they are going 2397
to be. If you get a lot of bad weather in Texas, you're hit hard on freight. If you get a lot of bad weather around Philadelphia and Baltimore and towns adjacent to our plant location, then we are in velvet on the other side. And they all sort of equalize and balance out, and that is what makes me make the statement that over a period of time it averages about five per cent of the whole (1212, 1213).

I testified that we distribute our published prices—that consists of price lists and discount sheets—to the trade.

We do not generally distribute these price lists in advance of the effective date. That varies, depending on the time element of the printing of them. If it happens to be a decline, for instance, we may be a week late getting them out, and then we would date them just as though we had issued them on the same date that the other fellow brought out the lower price. As to whether we always do that, I wouldn't say we always did it, but it would be my judgment that is what we would naturally have done, because the customer, having received a copy of the other man's lower price, if you ship him something in the interim between receipt of the competitor's lower price list and yours, he
2399 will write back and raise cain with you because you didn't give him the benefit of the lowest going price. So, you always make reductions conform to the earliest publication of anybody's price list (1213).

"Q. Well, at the opening of the cross-examination here, I asked you about American's price list on welded chain dated July 22, 1940, and you said that you got a copy of that price list, then you issued your own price list dated July 26, 1940. And at that time you indicated that you had your price list printed up after you received American's. You will note that the dates are different. American's price list is July 22nd; yours is July 26th. A. Well, that would have been our judgment as to the quickest or shortest time we could have gotten it printed. That undoubtedly represented an increase in some kind of item. We are not so
2400 fussy about that. Until you bring out the higher price, your customers hold you to furnish them the goods at the old price. So, the man that raises the price first is always subject to the attack of the people who follow him later, depending on how long it takes them or they make up their mind how long after he brings his out they are going to publish theirs, sir. It's just a little different than when it is a reduction" (1213, 1214).

2401

In the case of an increase you might at some time have dated your price list the same as the lead-off competitor. It wouldn't mean anything. In the case of a decline you have to. If you didn't you'd have a lot of confusion. The customers would fight with you about it. I would say that over a long period of time American generally leads off with increased published prices for all three types of chain products. There might have been isolated cases where that was not true. I couldn't definitely attest to that. It is our practice to copy American's published price lists and discount sheets when they get out new ones for all three types of chain (1214, 1215).

2402

As to whether the respondent chain manufacturers exchange price lists and discount sheets, I know I send, or rather my company sends, a copy of ours to all of the members of the Chain Institute and perhaps some outside of it, and we in turn get back a copy of practically all of them. I wouldn't say everybody, but I would say pretty close to everybody sends us a copy of all their price lists (1215).

I did testify that McKay has more than once published and distributed price lists and discount sheets on its own in advance of others in the case of a price decline. I am not familiar with the price movements of published prices of welded chain from 1936 to 1941, inclusive, from memory. I'd want to look at records. Somebody else asked me that same question, and I couldn't answer it, so I had to root through some of these price lists. I will show you this memorandum I have in my pocket. (Consulting the document referred to.) Well, I don't have it back as far as 1936. I can start at January of 1937. And then it went down, and then it went up a little bit, then up a little bit more, then up a little bit more, and the tendency from 1941, of course, would have been static because our prices were frozen in October 1941 and remained so until August of 1946. Our prices had actually been issued in September,

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so, therefore, the industry's September 1941 price lists were frozen until August of 1946—the welded chain prices. If this would be helpful (indicating the document), I can show you what I have here. It's a matter of record. You can get it right from these. I took the trouble digging through them. Mr. Kittelle asked me the same question, and I said "Hell, I can't remember all those things." I don't know whether I got them all here. Here is the memorandum in my own handwriting (1215, 1216, 1217).

I did not testify that my company had published price lists and discounts on its own in cases of decline in prices of all three types of chain products. I was only talking
2405 about welded chain. We wouldn't dare initiate a price decline on weldless chain; we are not a big enough factor to cut the price and establish leadership on that, either up or down. We did not initiate any price declines on tire chains; that we always wait for.

"Q. But in the case of welded, you have done that several times? A. Yes, sir, because we are rather a factor in the welded chain end, and, of course, we have a little more courage there than we have on some of the other items" (1217, 1218).

"Q. Well, did you know, Mr. Bond, that during the period of 1936 to 1941, inclusive, there has been only one decline in the published prices in the chain industry? A. Yes, I observed that from the figures I just got through showing you, sir" (1218).

2406 "Q. Well, when did you make these 'several' published price lists in decline periods? A. Can I get my record out and show you?

"Q. Sure.

"Trial Examiner Ballinger: Yes, sir, if you have a compilation (1218).

"The Witness: This is a list of price lists of McKay that you took. I got this from the list, and I looked

them up to see what the discounts were. So this is all in your records, sir. That's where I got it from (1219).

* * * * * *

"Mr. Schrimsher: Welded, that's what we are talking about.

"Mr. Denby: When were the big declines in welded? When did you lower prices?

"The Witness: October 1, 1938 the McKay Company issued a price list of 33⅓ and three 10's.

"*By Mr. Steinhauer.*

"Q. Where did you start with? How far back? A. October 1, 1938. 2408

"Q. Do you go back to the earlier, prior— A. Yes, the published discount prior to that was 33⅓.

"Mr. Schrimsher: That's correct. That's the only record we have of a price decline in the published prices of welded chain.

"Mr. Denby: For those years, you mean from——

"Mr. Schrimsher: Naturally the whole thing is prefaced with that—1936 to 1941.

"The Witness: You will have to admit that's some cut" (1219, 1220).

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There was only that one published price decline in the period from 1936 to 1941. Otherwise, published prices were all increases or they stayed the same, one or the other (1220). 2409

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I testified that Mr. Merriman would call me from time to time in relation to a reported price cut by our company. My reaction was that I think I stated very emphatically that I either told him the truth or told him it was none of

his damned business. Mr. Merriman's reaction to my answer was "Thank you" and then he would hang up. He couldn't do very much about it. I listened to Mr. Merriman. I tried at all times to be a gentleman. He's a very fine old gentleman. So far as taking action was concerned in the matter of the cut prices, I did as I pleased (1224, 1225).

Mr. Merriman is employed by the Institute. He would check with me because somebody would ask him to ask me if I'd cut the price on Bill Jones, because that fellow that asked the question didn't want me to know that he was the fellow asking the question. As to whether that was part of Mr. Merriman's job, I would say it was just sort of
2411 sicked on him. I wouldn't say part of his job. It was sicked on him by the guy who asked him to do it. If you want to put it that way, you could say that the man who asked him was, in effect, one of his employers. It was not part of Mr. Merriman's job. He wasn't hired for that purpose at all. He didn't call me up just for the fun of getting bawled out for no good reason. At one time they started some kind of a program of exploring past transactions. They even went to the extent of some attorney or somebody drafted up a form, and they used to send that out, and they'd list the transaction, name of the customer, what it was, and the date, and ask you to verify whether you had made that price or not (1225, 1226).

Well, in my case, frankly, I threw them in the waste basket. I wasn't going to answer any such stuff as that.
2412 And from that would develop Merriman's telephoning you if you didn't answer some inquiry of that kind. The thing all died of its own weight. It didn't last very long I can assure you (1226).

I did not testify that buyers often request delivered prices on chains. I said that they have our printed, published price lists and discount sheets. That tells them the whole general run of the mill prices on chain—standard

chain. If they want a price on some specific item, they will invariably request you to quote them—for instance, a jobber in, let's say, Macon, Georgia, will say, "Please quote us on 100 feet of one-inch conveyor chain, inch and a half by six inch size, delivered Macon, Georgia—or maybe delivered to some place where the sawmill is located other than Macon, Georgia, in which case, then, your quotation takes the price at Pittsburgh, adds the freight which you get out of the Donley book or which you get out of your own records, and then you quote the man, and when he gets the quotation he knows exactly what it is going to cost him laid down, and he doesn't have to worry about looking up the freight rate from Pittsburgh on that particular commodity and what have you (1230, 1231). The jobber has 2414
thousands of items and there are different freight rates on different classes of commodities (1231).

None of our buyers ever ask us for an f.o.b. mill price. That wouldn't make much sense, unless it would be somebody, some chiseler—A certain chiseling buyer in Baltimore, he would put pressure on to try to get us to quote him an f.o.b. York instead of f.o.b. Pittsburgh. That would be for the purpose, of course, of getting a reduction in price. He's not particularly interested in what you term an f.o.b. mill. He knows that York is so much closer to Baltimore than Pittsburgh is, and he would like you to sell him f.o.b. York (1231).

As to whether we would grant him an f.o.b. mill price, it has been done. Generally we don't, but I would come up 2415
with a cut price, you know, if that was part of the deal and you wanted to meet the situation and get the business from him. I frankly have had my start salesman, who is now the sales manager for one of my leading competitors, call me up from that man's place of business quite a few times in the last 20 or 25 years and proposition you: "Would you take an order for ten barrels of chain and make it such and such a price f.o.b. York?" (1231, 1232).

Apparently our customers haven't been bothered for the last 50 years about the amount of freight involved in purchases of chain from us. No, I wouldn't think that might be because they don't have any choice in the matter, whether they come to us or go to one of our customers. They have been accustomed to buying chains and many other items on this basis. Steel for many, many years (1232).

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Redirect examination by Mr. Denby.

The thing that the buyer wants to know is what the price is. He is so accustomed to it being f.o.b. Pittsburgh
2417 that even if he doesn't know what the freight rate is—he wants to know what he is going to pay for the article, then to which he adds the freight when it comes in. That's all a matter of routine in his organization because commercial chain, as we call the welded chain, and the weldless chain, is both bought by hardware jobbers and mill supply jobbers who have a different method of selling than the auto accessory jobber. The auto accessory starts from a list and works on discounts. The hardware and mill supply jobbers buy stuff and add a markup on it. Naturally the man buying stuff down in Texas would have an entirely different price on something sold f.o.b. Pittsburgh than a jobber in Cleveland selling the same article, by reason of the additional amount of freight that he would have to pay (1233, 1234).

2418 The freight, so far as he is concerned, is just an element of cost like any other element. Then he has to add a markup to make it profitable for himself to stay in business (1234).

Examination by Trial Examiner Ballinger.

As to the customer's interest in the total cost, I said that he was interested in knowing what the cost of the commodity was on an f.o.b. Pittsburgh basis, because he takes it for

granted that he has to pay the freight from Pittsburgh to his place of business, and if he would be comparing prices, as long as somebody didn't interject, as I cited this Baltimore situation, the delivered price or an absorption of some portion of that Pittsburgh freight, he would know the freight would be the same from no matter whom he purchased it. Then he only has to worry about whether the price of the commodity is the same (1234, 1235).

If there is a question of whether he could get it f.o.b. the nearest plant or Pittsburgh, he would certainly ask for the nearest plant. He is interested in getting the lowest price he can if he can get it there. That is obvious (1235).

Redirect examination by Mr. Kittelle. 2420

I think the confusion has been all straightened out. I started to make a statement concerning a certain answer that I had made and that it was limited to welded chain. That was the question of whether customers had ever kicked and wanted f.o.b. plant prices. That was only on welded chain. If our Baltimore customer bought weldless chain, he would be buying it from us f.o.b. York (1235, 1236).

The functions of the traffic committee of the Chain Institute involved things pertaining to freight that was of interest to the industry as a whole. It has been quite active in endeavoring through Charles Donley, our traffic counsellor, to protect our interests. Just at the moment Donley is probably in Washington. I'm not sure. I know he's 2421
been down here for the last couple of weeks looking after the Chain industry's interests in respect of all these requests for increased freight rates that are now before the Interstate Commerce Commission, and he was largely instrumental in conjunction with several other industries that he represents in having some of those rates increases suspended pending a hearing on them (1236).

He appears before the Interstate Commerce Commission and participates in their hearings on these rate changes of railroads. He prepares briefs and documents and files quite voluminous papers. As to the consultation with Donley and coordination with him, so far as the traffic committee of the Institute is concerned, Donley keeps me posted because of the fact that I am in Pittsburgh, and I in turn keep the Chain Institute office posted. And, if time permits, we wait until the next meeting of the industry or the Institute, and then I receive specific and direct authority to have him conduct some specific activity over and above that which is covered by his monthly, very modest retainer (1237).

2423 I don't mind saying that we pay him $45 a month. At the moment he is working under that $45 plus $300 a month and expenses to look after our interests down here. I think that the only reason I am still chairman is because none of the presidents ever took the trouble to review the committees and fire me off it. So it just simply revolves on me. Of course, I am the most convenient man to contact, being right there in Pittsburgh (1237).

To say that the freight was 30 per cent of the selling price of tire chains from York to Houston would be way too high. It might possibly run 15 per cent to Texas. Because, I don't think the freight rates are quite as high to Texas as you think they are, because we can ship down the Atlantic seaboard and you'd get a much higher freight rate if

2424 you were talking about Oklahoma or someplace over in there. It wouldn't be 30 per cent (1238). It wouldn't be far wrong if you were shipping all rail to the Pacific coast on a less carload basis, sir (1238, 1239).

Recross-examination by Mr. Steinhauer.

Mr. Donley was first employed by the Institute to get up a freight rate book. After the freight rate book was

gotten out, there wasn't much for him to do except keep it up and to look after our interests, for which we gave him a monthly retainer. When he first started out the first objective really was getting up this composite thing for the benefit of the NRA group (1243, 1244).

"Q. That's why his salary was reduced to $45? He was merely keeping up the book? Is that right? A. That's right—no. As I told you before, he would keep us posted of anything that was happening, don't you see, like a threatened freight increase. Then it would be up to the Institute to tell him if he should take action, for which we would pay him additional (1244).

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Examination by Trial Examiner Ballinger.

The Chain Institute was organized in 1933. It was part of the NRA set up. It was organized for that purpose. The Code Authority operated through and in and really was the Chain Institute—the same people. When the NRA ceased to function, the Chain Institute continued to carry on and perform about the same services that they had performed under NRA with the exception of the receiving and distributing of the enforced filing of prices. During the NRA the filing of price lists by each of the constituent members of the Code was mandatory. When the NRA ceased to function that practice was discontinued (1245, 1246).

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I believe that I testified that the majority of manufacturers mailed their price lists to their competitors. I wouldn't say that applied to them all one hundred per cent, but that was a general practice. At the time the practice was first adopted the object and purpose of the distribution of the price lists among competitors was, I would say that we would naturally have arrived at the conclusion that it was a rather good idea the way we had worked it under NRA. It at least kept up posted as to what our competitors

were doing. It is a little difficult at times to get the price lists of some of your smaller competitors, that is, from the jobbing trade. We can always get the American Chain Company's pronto, but the smaller ones sometimes may take you several weeks before you catch up with them (1246, 1247).

Our company copied the price lists of American. That fact was generally known. The other companies did likewise. Unquestionably the reason for the distribution of our price lists among all our competitors was for the purpose of advising them that we were following the same price range set out in the American's price list (1247, 1248).

2429 *Redirect examination by Mr. Kittelle.*

When we sent these price lists to our competitors and to the jobbing trade, we sent them all out at the same time by addressograph. I testified that we sold some of our products to some of our competitors (1248).

My logic in doing this would be that if the American raised their price, and I followed them, the quicker I got a copy of my price list in the hands of my competitors, including American, the quicker and surer I would be of being able to take advantage of that high price, because I would assume that just as soon as they made up their minds they had filled their books with the old-priced orders that they would then copy and do as I had done. The longer
2430 it took them to find out I had done it, the more hesitancy there would be on their part, because regardless, and with all due respect to the American Chain Company, they can't force even the smallest manufacturer to follow them on a price increase, and I defy them at any time if I want to knock their ears down, all they have to do is to bring out an advance in price if I don't approve of it (1249).

Redirect examination by Mr. Denby.

In such a case I would stand pat and they're in a hell of a fix (1249).

Recross-examination by Mr. Steinhauer.

As to whether I have ever done that, I wouldn't want to commit myself (1249).

Redirect examination by Mr. Denby.

What I mean to say in answer to the question as to whether I ever fai[illegible] to follow is that in all sincerity I would 2432
say no. Their policies are usually sound on an advance, though they have not always been sound on a decline. The declining prices have been brought out in the same week that the price of steel went up, but I couldn't do anything about it. I had to follow the decline though it was against my better judgment and all the rules and laws of economics (1250).

Redirect examination by Mr. Duncan.

When I was connected with Standard Chain Company and we received an order from one of our customers, the order did not specify what mill the stuff would be shipped from. We had the right to ship from any one of those mills. We named one price irrespective of the mill from 2433
which we shipped, f.o.b. Pittsburgh basis. As to whether that was a desirable practice, it was the only fair thing to the man, because he wouldn't know what mill we were going to ship it from, and it wouldn't be fair to ship it from a point that would carry a higher freight rate than it could have been shipped at from a factory that had a lower freight rate. Therefore, it was the only reasonable way that we could give all of our customers the same price f.o.b. Pittsburgh regardless of what factory we might have

shipped it from. We had ten factories. That is one reason that we found the f.o.b. Pittsburgh basis a satisfactory one at that time (1250, 1251).

The practice was in effect at the time I became associated with the Standard Chain Company, but it seemed a very logical and sane and fair method of selling when you had a multitude of factory locations (1251).

Recross-examination by Mr. Steinhauer.

During all that time we were charging the customer phantom freight when he was paying more freight than
2435 from the nearest mill, if we happened to ship it from a nearer point (1251).

Examination by Trial Examiner Ballinger.

After the NRA ceased to exist and the Chain Institute proceeded to function we not only discontinued the distribution of our price lists through the Chain Institute but the Chain Institute also discontinued any attempt at enforcement of prices. That ceased immediately upon the so-called Schecter decision. My memory is clear on these points because I was secretary of the Code Authority (1251, 1252).

"Mr. Kittelle: I might say to clarify the record that Respondents' Exhibits 2, which is the Code for this
2436 industry, shows that the Code Authority was composed of the trustees of the Chain Institute, Inc., with one member elected in accordance with the procedure of the Code to represent the people who were not members of the Institute.

"Trial Examiner Ballinger: I think the record discloses, and I think it is common knowledge, that the Code Authorities pretty rigidly enforced adherence to the price list" (1252).

* * * * * *

EDWIN J. TREVETHAN, called as a witness by the Petitioners, testified as follows on October 2, 1947:

Direct examination by Mr. Kittelle.

My address is McDonald Heights, R.D. 2, York, Pennsylvania. I am retired at the present time. I retired November 1, 1945 from American Chain and Cable Company. At the time of my retirement I was sales manager of the weldless chain division and had occupied the position since August of 1924. I first went to work for the American Chain and Cable Company in June 1913. Prior to that time I worked for Bridgeport Chain Company which is the same company that is now the respondent Bridgeport Chain and 2438
Manufacturing Company (1256).

I went with the Bridgeport Chain Company about March, 1908 as a general porter. I developed from one job to another. Finally I had charge of the chain assembly room, so-called, and then I went on the road selling for them. When I was first with them they were then manufacturing weldless side chains and flat metal chains. They made no welded chain at all nor any tire chain. They made the side chain for tire chain (1257).

We sold those side chains to Weed Chain Tire Grip Company. The only other company manufacturing wire weldless chain in the United States at that time was Oneida Community at Oneida, New York. There were others making small chains, such as the so-called jack chains, safety 2439
chains, sash chains, plumbers chains, and so forth. At that time there was Smith & Egge at Bridgeport, Connecticut. I think Turner & Seymour at that time made some of the small chain (1258).

"Mr. Steinhauer: That is 1908?

"The Witness: Well, we are speaking of 1908 particularly, yes, that is what we are talking about. Turner & Seymour——

2440 *Edwin J. Trevethan—For Petitioners—Direct.*

Direct examination by Mr. Kittelle resumed.

I believe John M. Russell Manufacturing Company started about that time. That pretty nearly constitutes the list of those that were at all important, I think. The small chains made by Smith & Egge and Turner & Seymour and Russell were sash chains particularly. That was what Smith & Egge made; and then the small jack chain, that was made in a few types; and safety chain, which is a flat metal chain, and plumber's chain and so forth (1258, 1259).

The wire chain which I mentioned was made by Bridgeport Chain Company. It was known as Brown chain. It
2441 was a patented chain, named after the man who patented it. Oneida Community made a wire chain somewhat similar called the Niagara Pattern. That was in a different style link, because of course they could not manufacture the Brown chain, on account of the patent. Theirs was a sort of a flat wire link chain. As to the method of selling that the Bridgeport Chain Company used at that time, it is pretty hard to recall back that far, but my recollection is that they equalized freight with Oneida because Oneida was closest [sic.] to the big markets than Bridgeport. They had the freight advantage. Bridgeport Chain sold f.o.b. Bridgeport, freight equalized with Oneida, according to my recollection. At that time New England was not a big market, but when Oneida did come in there they would equalize with Bridgeport, naturally. They sold f.o.b.
2442 Oneida, freight equalized with Bridgeport (1259, 1260).

Later the Cleveland Galvanizing Works came into this wire type weldless chain business. They were located in Cleveland, Ohio, and in this weldless line they manufactured first, two or possibly three sizes of Tenso chain. Their chain was known as Bulldog chain (1260).

The Bulldog chain was competitive with the Brown chain of Bridgeport and the Niagara Pattern of Oneida. As to the effect of such competition upon our method of selling

at Bridgeport Chain Company, we simply had to equalize with Cleveland rates where they enjoyed lower transportation charges. We would be selling f.o.b. Bridgeport and equalizing with Oneida (1260, 1261).

> "Mr. Steinhauer: When did Cleveland come in?
> "The Witness: I swear I don't know for sure. I would say 1909, 1910, with that particular pattern, speaking of that one. Prior to that time they had manufactured pump chains. Their chief business, however, was galvanizing" (1262).

Direct examination by Mr. Kittelle resumed.

2444

The Bridgeport Chain Company did not make pump chain at that time. Nor did Oneida. The weldless chain business of Oneida was purchased by the American Chain. That happened about 1912. American just bought the machinery, the business, and the good will. They bought the Niagara trade mark. That went with it. With the machinery of Oneida, American built a new plant at Bridgeport, moved it there in 1913; about October 1913 I think that the Bridgeport plant was ready. After that the Oneida Community company simply made chain for their animal traps. They were the biggest manufacturers of animal traps on earth (1261, 1262).

After Oneida closed out their chain business they did not sell the chain that they made for their traps commercially (1263). 2445

After American moved the machinery to Bridgeport they sold their wire weldless chain on an equalization basis, equalized with Cleveland freight, as an example. They sold f.o.b. Bridgeport, freight equalized with Cleveland. It is my recollection they started that soon after the Cleveland Galvanizing Works began the manufacture—in fact, I am certain of it. Of course, we always follow their prices (1263).

I don't know whether it was later or not, but there was a concern in Cleveland that began the manufacture of Tenso chain. I heard very little about them. I don't recall that I ever heard of them, notwithstanding I was on the road then, until our company purchased that business, and that is where our company got their first Tenso machinery, and that is where the Tenso trade-mark came from (1263).

The name of that company was, I think, the Cleveland Wire, something of that nature. I am not absolutely certain of their name. I don't believe I heard it. American Chain bought that business and they moved the machinery to Bridgeport.

2447 I know of the Cincinnati Pump Company. I don't know when they came into the weldless chain business. I could not say that with any certainty of being right. I imagine it was sometime early after the First World War. That is my best recollection. They made a few sizes—the popular sizes—of weldless chain—Tenso, but I think they called it Hercules, if I remember correctly (1264).

That made a change in this freight equalization which we were using at the time. They were close to the Southern market, where there was a great deal of that chain used, so naturally we had to equalize with Cincinnati (1264, 1265).

That situation did not change any, up to the time that I retired from American Chain and Cable Company. You couldn't think of a better arrangement, we couldn't. American later moved its weldless chain manufacturing to York.

2448 That happened in 1927—the latter part of the year. They sold freight-equalized with the nearest competitive point. They sold f.o.b. York, freight equalized with Bridgeport, Cleveland or Cincinnati, depending on destination. That situation remained the same up to the time I retired (1265).

American Chain Company manufactured sash chain. When they purchased Oneida Community's business they got sash chain equipment. Oneida had made sash chain. Before we moved to York we sold sash chain about as fol

lows. I happened to be reviewing some old price sheets, I believe with Mr. Seitz, and I see [sic.] there was a freight allowance on sash chain, 25 cents per hundred on shipments of 300 pounds and more. I believe that is correct. Now, the reason for that was that Smith & Egge was the old, established firm in that line, and my recollection is we just followed along with their custom. We weren't important, originally, in the sash chain field (1265).

On jack chain, we did not make that for quite a number of years after American Chain Company organized. I believe we showed it in our price list, though, but did not begin manufacturing it for—oh, quite a few years, and then after we got the equipment, because of the variation 2450
in sizes of different manufacturers, we did not pay very much attention to it—couldn't very well (1266, 1267).

As to the freight allowance basis for some of this small chain, why, it was just what the price sheet said: freight allowance up to 25 cents per hundred pounds on shipments of 300 pounds and more (1267).

We were allowing that freight, apparently, only from Bridgeport, so you would only allow the actual freight rate if it was less than the actual allowance. If the buyer paid more than 25 cents, he got 25 cents. If he paid less, he would get what he paid. If he paid 25 cents, he would get the full freight. As to how Smith & Egge sold at that time, I thought that I made it clear. It is my recollection that we followed their practice. I know that was our custom, not to upset the applecart if we started any new lines 2451
(1267, 1268).

* * * * * *

"(Respondents' Exhibit 12 for Identification was received in evidence)" (1269).

"Q. I just want you to take a look, if you will, at this jack chain here. A. Yes.

"Q. Is that one of the small chains you were talking about? A. Oh, yes.

"Q. And it says that is sold f.o.b. York, freight equalized Cleveland and Bridgeport? A. Yes" (1269).

That was after the American Chain had moved its weldless chain plant from Bridgeport to York (1269).

> "Mr. Kittelle: * * * Respondents' Exhibit 12 is a Discount Sheet No. 105 of the American Chain Company, Inc., effective December 12, 1928, on weldless wire and flat metal chain" (1269).

Direct examination by Mr. Kittelle resumed.

2453

That constituted a change in the method of selling from the old freight allowance basis. It superseded it. The point was changed, the basing point. They put it on the plant in York, based it from there (1269, 1270).

I am familiar with the Holland Furnace Company. I used to know them pretty well. They made a safety type chain. I believe they called it a furnace chain. I couldn't say when they began making it. American made furnace chain. Holland Furnace wasn't the first to make chain in Holland. Hart-Cooley of New Britain, Connecticut, register manufacturers, built a plant in Holland, Michigan for the manufacture of registers. Holland Furnace was one of their biggest customers, and it was in that field anyway,

2454 and it was more centrally located for their trade. They made this furnace chain because they made the regulators that went with each furnace; it required chain and a lot of other things, and they put it up in a suitable package, and it went well with the furnace trade (1270, 1271).

Then, eventually, although I didn't know it until recently, Holland Furnace took over Hart-Cooley. I didn't know what happened. I knew Holland Furnace was making the chain, but what became of Hart-Cooley, I never knew, and I never tried to find out (1271).

We eventually equalized freight with Holland, Michigan on that furnace chain, but not for a long time, due to the fact that they manufactured these regulators and it was all tied up with furnace manufacture, and we lost interest in the furnace chain business. But, we were getting orders from jobbers, for that chain, separately packed, and they were packed in small cartons. Finally, these jobbers began to deduct on the basis of Holland freight and so, of course, we woke up to the fact that we were passing up quite a little bit there, not knowing it. It went to the hardware trade (1271, 1272).

Cross-examination by Mr. Schrimsher.

2456

I testified that it was my recollection that I went to work for the Bridgeport Chain Company in 1908 and worked for them until 1913. When I went in there I was practically a porter. Then I had charge of what they called the chain assembly room, and from there I went on the road for them as a salesman. I was a porter for two or three months, possibly six months. I was in charge of the chain assembly room not very long. I think less than a year (1273).

It was at least a year after I went to work for them before I became a salesman. I do not know when Bridgeport began making weldless chain. They were making it when I began to work for them. According to my recollection, at that time, 1908, Oneida Community was the only other manufacturer besides Bridgeport (1274). 2457

As to whether Bridgeport, when they entered the business of manufacturing weldless chain, following the pricing method or rather basing their price method on Oneida's, I don't know when Bridgeport began the manufacturing of chain—in fact they were the first in that field. I testified that it is my recollection that Bridgeport on making sales of weldless chain, equalized freight with Oneida (1274, 1275).

I know why that system was adopted—very simple. So that all buyers would be on an equal basis so far as the freight charges were concerned. That method of selling I think was in effect when I went with the company. As to my own knowledge of the why of the adoption of the system of selling, it seems to me so logical—. As to why Bridgeport adopted this system of selling weldless chain, if I may put it this way. I know very well that they adopted a system of equalizing freight with other competitive points because—with the idea of meeting competition where they had competition. That is the only reason for doing it, the only one reason (1275).

2459 Q. As far as you know, though, as a matter of fact it could have been by agreement, couldn't it? A. Oh. I wasn't there.

"Q. In other words, all this other is your opinion? A. Pretty sensible opinion" (1275, 1276).

* * * * * *

The Cincinnati Pump Company went into business in Cincinnati shortly after the First World War. They made the same type of chain as American—Tenso pattern. They made the weldless wire chain in a few sizes, a few popular sizes. When Cincinnati Pump went into business American equalized freight at Cincinnati. I presume Bridgeport did. As to American, I don't know how soon—well, yes, just as soon as the competition began to get harmful. As to whether the Cincinnati Pump and Chain Company was in

2460 business in 1928, for certain, I don't know. Yes, they must have been (1276, 1277).

There is no notation on Respondents' Exhibit 12 on freight equalization with Cincinnati. This price list is dated December 15, 1928. Apparently, they weren't making the chain, or else we had not heard a great deal about them. You see, they had not affected our business. It would appear that they were not making the type of chain that

American had listed. At least, they were not very aggressive, or we would have had the Cincinnati equalization in there (1277).

I do not know how long it was before American did any equalizing with Holland, Michigan. I testified that I first got the idea when jobbers began to adjust freight on the basis of equalizing with Holland. I don't know how long it was before. They did it quite some time before we did (1277, 1278).

I am not familiar with Peerless Chain Company located in Winona, Minnesota except by name. I don't know anything about them. American, during the time I worked for them, did not equalize freight with Peerless Chain Company on the weldless lines; as far as I knew they were not manufacturing weldless lines. I don't know if they do today or not (1278). 2462

W. D. KIRKPATRICK, called as a witness by the Petitioners, testified as follows on October 2 and 3, 1947:

Direct examination by Mr. Kittelle.

My address is York, Pennsylvania. I am connected with American Chain and Cable Company. I have been with them since 1914 starting as salesman in our Philadelphia District. I became district sales manager in the Philadelphia District 1927. In 1928, I transferred to Chicago as district sales manager in the Chicago territory. In 1934, I transferred to Bridgeport, Connecticut as sales manager of our auto accessory department. In 1935, I transferred to York, Pennsylvania; continued to be sales manager of the auto accessory department. In 1938, I became general sales manager of the American Chain Division, Manley Manufacturing Division, Wright and Ford Hoists Division, and the Malleable Division of our com- 2463

pany. I am now vice president and director of the company (1279, 1280).

When I came with the company in 1914 its name was the Weed Chain Tire Grip Company. Its headquarters in 1914 were in Bridgeport, Connecticut. It then manufactured tire chains—the well known brand of the Weed chain. They did not actually manufacture the whole thing then. As a matter of fact, they were more or less of assemblers. We purchased our side chain from the Oneida Community Chain, and our cross chains from the Standard Chain Company. After we purchased the weldless chain department of the Oneida Community Company, we started to manu-
2465 facture our own side chain. After we purchased the Standard Chain Company at York, we started to manufacture the cross chains (1280).

By Mr. Steinhauer.

Around 1913 we purchased the Oneida Community Company to the best of my recollection, and the beginning of 1917 we made the final purchase of the Standard Chain Company at York. That made the two commodities (1281).

Direct examination by Mr. Kittelle resumed.

At that time the side chains for tire chains were weld-
less chain, made of what we termed in those days and still
2466 do today, the lock-link side chain. The side chains for tire chains are not still weldless. Generally speaking, they are welded today. The cross chains were always welded. Today the American Chain and Cable Company makes from plumber's safety chain to ship's anchor chain. I mean by that the sash and kindred lines, the full line of weldless chain, and the full line of welded chain, and the full line of tire chains (1281).

In 1917 we changed the name of the Weed Chain Tire Grip Company to the American Chain Company, and early

in the '30's to my best recollection we changed our name from the American Chain Company to the American Chain and Cable Company (1281).

The reason why our weldless chain operations were moved from Bridgeport to York about 1927 was the consolidation of manufacturing of the chain business. Also economies were put into effect because we purchased our raw material from the Pittsburgh area, shipped it up through New York, up over the New York, New Haven and Hartford, and then a good bit of our commodities were shipped back over the line that we shipped it up there on. We had trouble with the embargoes—because we sold so much chain—on the New York, New Haven and Hartford—embargoes getting our raw material up there and 2468
also getting it reshipped again. And it was a consolidation move all the way through (1282).

When I came with Weed Chain Tire Grip Company in 1914 I sold tire chains for them. They were sold f.o.b. mill with full freight allowance in 500 pair quantities. If a buyer bought less than 500 pair they were sold price f.o.b. mill with no freight allowance. The buyer would pay the freight. If he bought 500 or more pairs they were sold f.o.b. mill with full freight allowed to his place of business, at the lowest tariff rates (1282, 1283).

We sold tire chains in 1914 to the automobile accessory jobbers and to some hardware jobbers. There may have been a few exceptions to that, like an electrical jobber and what not, that had opened an automobile accessory de- 2469
partment (1283).

The 500 pair limitation on our freight allowance is not the same now. It has changed from the year 1914 downward to today when we have on passenger car chains 24 pairs of chains with full freight allowance or equivalent. By equivalent, I mean we have set up in our published prices equivalents to 24 pairs. It goes down, I think, as low as three or five pairs of farm tractor chains. A great

deal depends upon the weight. I might say in the beginning chains were so light, when we made 28 x 3's for Ford cars, till today when we made 600 x 16 for the car, that the weight was quite light at the beginning compared to what it is today. A pair of 600 x 16 tire chains for a passenger car weigh approximately 10 to 12 pounds.

The 600 x 16 passenger car size is the most popular size for passenger cars. The 600 x 16 unpatented Weed brand passenger size car chains are made in light car specials and in regulars, but they run around $7.75 or $7.85 per pair consumer's list price, to the best of my knowledge. Today the jobber would pay on a net price
2471 equivalent to approximately 50 and 7 off. That would bring it down to about 53½ off the $7.85 or a little less than half of the price (1284, 1285).

As to whether or not the cost of manufacturing and selling tire chains has changed from 1914 to 1947, the chain has changed with the times and with the automobile. For a Ford car, which used to be your most popular size, it was 28 x 3 and 30 x 3, so the chain for the Ford car today naturally would be three times the weight and naturally the cost would have gradually gone up considerably with the weights having gone up as they have. Labor costs have gone up. The price of steel has gone up (1285).

In 1914 the Weed Chain Tire Grip Company distributed its tire chains throughout the United States including the Pacific coast, Maine and Florida. They were sold for mud
2472 chains and sand chains in Florida and extensively used (1285, 1286).

Prior to 1914 the Weed Chain Tire Grip Company sold through manufacturers' agents. About 1914 a decision was made by the executives of our company to switch over to our own men, and I was one of the first direct factory men of our company. We switched over shortly after that to our own men and gave up the methods of distributing through manufacturers' agents. In 1914 I would say that we had six or eight direct salesmen on the road (1286).

These manufacturers' representatives or agents were of automobile accessory lines--non-competing lines. They handled non-competing lines such as spark plugs, brake lining, gaskets, non-fluid oil, windshields, Jones speedometers, et cetera. As to how the manufacturers of these non-competing products sold their goods, I only know from hearsay, because I was a little bit too young at that time to have actual experience (1286, 1287).

When I was selling we sold to automotive jobbers. I knew how they were buying other automobile products such as speedometers and the like from the manufacturers of them. 99 per cent of all of the automotive jobbers buy all of their accessories at f.o.b. mill, with full freight allowed in certain quantities. 2474 That is the same basis as the tire chains were sold on then and the same as they are sold now. The reason the Weed Chain Tire Grip Company used that method of selling was because we believed at that time that we wanted to be a national company. We wanted to make tire chains available in Portland, Maine and Portland, Oregon, and we wanted to have tire chains sold at the same price all over the United States. We wanted to see that the consumer received the right kind of a price. We wanted the jobber to make a reasonable profit and the dealer to make a reasonable profit, but we didn't want the consumer gypped (1287, 1288).

We suggested resale prices to our jobbers. We printed the price list of our chains on our bag as long as it was permissible by law, so that the consumer would know 2475 what price to pay for a pair of chains. We packed our tire chains in a canvas bag, we'll call it (1288, 1289).

We have advertised tire chains continually from the time we started to manufacture up to date. In the early days in 1914 we advertised in trade papers, magazine and consumer copy. As a matter of fact, I noticed in the last couple issues ago of the Saturday Evening Post that we had advertised, according to their statement in the Post,

tire chains in the Saturday Evening Post continuously for 38 or 29 years. I forget which one it was—either 38 or 39. That is quite a record for a poor tire chain manufacturer. We used billboards quite extensively until the women of the country began to say that it annoyed their beautiful scenes on side roads, and we discontinued it (1289).

* * * * * *

We used poster advertising. I used to drive a truck throughout the United States, and my duty was to go into every garage I came across and, with a hammer and tacks, nail up posters. I would put them up in a prominent place in the garageman's place of business, so that the consumer
2477 could see what price he should pay for a tire chain, and to have them in a prominent place so it would remind him of buying a pair of tire chains before it was too late. We advertised in newspapers extensively in those early days. We had photographers down in Washington, and we have in our files pictures of the President's cars, Vice President's, Supreme Court Judges and Justices. I think we have one of Chief Justice Holmes' car. And we took the picture so that we could get their license number with Weed tire chains on. We advertised that extensively (1290, 1291).

We have kept up our advertising. It has become more extensive than it was in 1914. We still advertise in consumer publications and newspapers (1291).

2478 * * * * * *

As to the way the delivered pricing method would facilitate getting national distribution, a jobber likes to know what the material costs him. He likes to know what you are going to sell the product for to his competitors. If you didn't have your full-freight arrangement planned, a jobber further away from a factory would pay more for the goods at his place of business than a jobber nearer the factory. Oftentimes those jobbers are in competition with

2479

each other. There would be wrangling back and forth as to resale prices. We wanted the goods to cost all of the jobbers in the United States exactly the same price, and we wanted the dealers all to pay the same price, and we wanted the consumers to pay a fair price. I can tell you frankly that in times of emergency I have seen dealers gouge the public and make them pay as high as $25.00 for a pair of tire chains. They never did it during the time when our prices were printed on the bag. I'm always in favor of having the consumer get a square deal (1291, 1292).

When I came with the company in 1914 it had as competitors in the tire chain business only infringers. It is right that the record shows that the patent expired on these tire chains on August 23, 1921. I remember that as being the date very distinctly. At that time competitors came into the field of tire chain manufacturers like mushrooms overnight. As a salesman and district sales manager in the territory, it was part of my job to keep watch over these competitors in the sense of trying to find out what they were doing. I would do it by contacting various jobbers whom they came to try to bait and to offer special deals with, in order to take away from us. We learned that these new manufacturers were selling the chains f.o.b. mill, with full freight allowed to the jobber's place of business at the lowest published tariff rate (1292, 1293).

2480

According to all rumors they were not selling at the same price as we were in 1921. There were a lot of special deals. I am taking them all together. There were one or two that sold at the right price, although they had some special deals. When I say "the right price" I mean at their published price with no special deals. These fellows published the same price that we did when they came out (1294).

2481

As to these rumors of the special deals, I'd see full consignments made. I would see five per cent on volumes at the end of the year and exclusive territories given to job-

bers by these competitors of ours. I would see the invoices of these competitors in the jobbers' hands. The answer to the question as to whether it was frequent or infrequent practice for jobbers to disclose competitors' invoices is yes and no. It depended on how well you knew the jobber (1294, 1295).

We had no discussions with these competitors when they came into the tire chain business after 1921 about their method of selling f.o.b. mill with full freight allowed. I did not overhear any such discussions nor did anybody in our company tell me that they had any such discussions with them. We wouldn't be in the same room with them
2483 (1295).

Except in respect to quantities, there has been no change in our company's methods of selling f.o.b. mill with full freight allowed from 1914 up to the present time. By quantities, I refer to the 500 pairs in 1914 and the 24 pairs now. As to giving consideration to changing the method, in our company, with the people concerned with tire chains, we have discussed everything from soup to nuts. But we have never seriously contemplated any different way because we couldn't find any better way than we now have in effect (1295, 1296).

As to whether we have had any discussions with competitors at any time from 1921 on up to the present time with regard to this method of selling, its change or continuation, that method is so accepted by the jobber that
2484 there needs to be no discussion with competitors or anyone else. We have not discussed that method of selling with any competitor. I have never heard it discussed among competitors. No one in our company has told me that he discussed it with any competitors nor overheard any such discussion.

As to why we couldn't find any better method of selling, over the years that we had had it in effect it has worked so smoothly. It works satisfactorily with our company.

It works satisfactorily with the jobber. It works satisfactorily with the dealer and the consumer. We could find no method that would be as satisfactory to all concerned (1296, 1297).

Automotive accessories are still being sold on this same basis. Practically 99 per cent of them are sold on a full freight allowance basis. I have had discussions with our jobbers and customers as to the desirability or undesirability of this method of selling so far as they are concerned. They have said that they like it. As to their reasons for liking it, it simplified their business procedure and enabled them to know what a thing cost and what they had to add to it for profit and what profit they made (1297). 2486

At the present time, so far as the different types of tire chains that we manufacture are concerned, we make a passenger car tire chain which is known as our regular type chain. We make for some sizes a light car special in the passenger car chain—600 x 16 size only, which is the most popular size. It is lighter in grade, lighter in weight from the regular. It has I think 13 cross chains to a half pair, the same as the regular. Only they are lighter. We also make what we call in the passenger car chain our V-bar reinforced tire chain. We also make an extra heavy in the passenger car chain. It is not reinforced. In the truck chains we make chains for light trucks in singles and the duals and in triple side chains. We make them regular weight. We make them extra heavy 2487
weight, and we make them reinforced. And in the farm tractor chains, we make what we call our bull farm tractor chain, which is a chain used off the highway, used on farm tractors to assist them in plowing and other work they do around the farm. We make chains for cultivators, motorcycles. We have made them for airplanes (1298, 1299).

We have made them for horses, but that is not known as a tire chain. We made the overshoe chain for horses, a good many hundred pairs of them, a good many thousand pairs of them. We made chains for half tracks, chains for excavation work, chains that weigh as high as three thousand pounds to a half a pair. The wheels are half the height of this room. We make them for front wheels and rear wheels, fire apparatus and so forth (1299).

We made hundreds of thousands of pairs of tire chains for war uses during the last war and we developed chains for war use for the half track that saved our Government hundreds of thousands of dollars (1299).

2489 The V-bar type chain is patented. It is not what is known as the bar reinforced type. Our company has a research department that is continually trying to keep up with the motor manufacturers in development of their cars. We are trying to keep our chain up in accordance with the way they have developed. Our research department works continuously on the improvement of our product. We were the first one to ever bring out a reinforced chain which was known as the deluxe chain. It was a regular link with a piece of twisted wire around it that gave additional wear. They skated and skidded like a roller skate (1300).

We then started in and tried to improve it, and we brought out what we called the straight bar reinforced tire chain, which certainly was a good deal better than the reg-
2490 ular chain and it was a good deal better than the deluxe, and it gave double the mileage of the regular chain. It was the regular link with a bridge of steel put across that link for reinforcing purposes, and it gave additional wear. The mileage was double the amount of an ordinary chain (1300).

Now, we will go to the diagonal bar, and then we will go to the V-bar, which is the type we are now making in passenger car chains. On truck chains we still make the regular, the extra-heavy and the bar type. The V-bar

is a separate additional patent to the straight bar. They are all included in the license agreements which are in evidence here (1301).

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Generally speaking the quality as between manufacturers of tire chains is about the same so far as the materials that are used. As to the methods of manufacture, some manufacturers could not hold tolerances as close as others. I mean by that in the case-hardening, the heat treating, also in the inspection. I believe that we hold ours as tight as we possibly can so as to give as good a product as possible (1301, 1302).

In the minds of jobbers one unpatented tire chain is 2492
not as good as another, regardless of which manufacturer makes it. They aren't as good. They don't perform as well. There is no difference in the minds of jobbers on quality on the unpatented except as far as the reputation of the company is behind the product. Generally speaking they are made about the same, except, for rigid inspection and better welding. We do or have commanded a better price than other manufacturers on our unpatented chain (1302).

We have maintained a selling price and maintained our selling price where jobbers have told us they would rather have our chain than they would some other manufacturer's. This includes the situation where the other fellow was giving them a longer discount. There have been par-
ticular manufacturers in the period prior to the beginning 2493
of this war who sold their unpatented tire chains generally cheaper than we did. They were Hodell, Cleveland, Western, Nixdorff-Krein, Peerless, International (1303).

They sold them different than we did. They did not publish their prices and discounts different than we did. The difference in price between us and them runs from five to fifteen per cent. That holds for the period 1935 to 1941. That percentage has varied depending upon the

economic circumstances and also the weather. It has been depending upon the conditions, the economic conditions and the weather conditions as to the demand and supply. It has varied.

We charge more for patented bar reinforced and V-bar tire chains than we do for our regular unpatented chain. Roughly, we have endeavored to keep the differential approximately fifteen per cent although with advancing cost I believe they will average between 15 and 20 per cent today (1304).

We are continually making tests to show the comparative wearing qualities of the patented as against the unpatented. They have shown that our patented chain gives
2495 more than double the mileage, gives better anti-skid and better traction than the regular chain.

Other manufacturers who were not licensed under our bar reinforced patents had some reinforced tire chain products. Peerless Chain had what they called a diamond link. I don't know whether Western Chain infringed Peerless or Peerless infringed Western. I think Western may have infringed Cleveland. I don't know. But Western Chain had a reinforced link. Nixdorff-Krein has latterly made an arrangement with Peerless, I believe. Cleveland have their own. Hodell is a licensee of ours. McKay have their own. International Chain have their own. I think that about covers the field (1304, 1305).

Columbus-McKinnon does not make a reinforced link.
2496 They make a premium chain of a special type of wire. Their wire rather than being round is more of a tear shape. They call their premium chain a claw type chain, and it's a very good chain. You would have to look at the diameter to get the tear rather than a cross section. If you cut a piece of wire in half the right way and looked at the end of it, it would be tear-shaped. You have got to cut the tear way and not across the short way. Cut it the full length of the tear (1306).

Comparing our patented chain published prices and published discounts with those of manufacturers who were not licensees, generally speaking over this period, all reinforced tire chains' list prices were the same. Columbus-McKinnon never tried to get as much for their claw chain as the reinforced manufacturers got from their reinforced chain. Generally speaking, I would say that their list price was about half way between the difference—half way between the unpatented and our patented (1306-1307).

During the period from 1935 to 1941 other non-licensee manufacturers of reinforced chain sometimes adhered to their published prices and sometimes they did not. I learned that from contact with jobbers (1307). 2498

Examination by Trial Examiner Ballinger.

Generally speaking it would be in exceptional cases when supply and demand—that there would be variations—and when they were trying to pull a deal (1307).

Direct examination by Mr. Kittell resumed.

We have made attempts to inform ourselves as to the inventories of tire chains which our jobbers keep from time to time. We have, prior to the war, religiously taken inventories of all of our jobbers' stocks at the end of the so-called season, so that we know how many to manufacture for the next season. The jobbers think they are carrying an adequate inventory, but along comes an emergency and they are cleaned out overnight. During the period from 1935 to 1941 we carried warehouse stocks of tire chains in various places around the country. We rented the buildings for warehouses in some places and other places we owned the buildings. We had our own employees. We had warehouses in Philadelphia; Bridgeport, Connecticut; Chicago and San Francisco. They were 2499

the warehouses that we owned or leased and we operated them where we carried tire chain stocks (1307, 1308).

We did not carry any tire chain stocks in public warehouses where the warehouse people themselves handled the stock. We did carry consigned stocks in the hands of our jobbers during that period. As to the extensiveness of this, I believe our contracts during that period are on file. They will show that we went on a 50-50 deal. When we went out to take our orders for tire chains, we would take an order for $100 worth of tire chains, and we would consign $100 (1309). It was on a 50-50 deal. Then as the jobber sold his own $100 worth of tire chains, he would
2501 dip into our consigned stock and sell that, and as he sold those he would pay for them. That plan was open to all our jobbers, all who had approved places of business that would carry the insurance on our consigned stocks, and had adequate facilities for taking care of them and handling them. The consigned stocks were pretty heavy in a good many cases. We did carry consigned stocks in the same city that we had our own warehouse stocks (1308, 1309, 1310).

I know hundreds of cases of situations where we had a severe blizzard in a particular locality and the resulting demand for tire chains. I'd like to describe one that we had in Chicago. I was district sales manager in Chicago at that time. I think it was 1929. Overnight we had blizzards where people were absolutely confined to downtown.
2502 They couldn't even get home. Our warehouse was prepared, because it knew the season was coming on, and we had probably 25 or 30 carloads in our own warehouse in Chicago. Those chains went out overnight. I telephoned continually to our factory at York and during that emergency we had as high as 30 carloads in transit at one time (1310).

As they would come into the warehouse, luckily we had a warehouse where switching was open, and they could come in and they were shipped out again (1310).

We have letters in our files from hospitals, nurses, public services, doctors—I'm thinking about pregnant women that doctors had to get to—milk companies, Borden's Milk Company, saying that if it hadn't been for our service at that time the people in Chicago would not have been able to get milk for their babies (1310).

When an emergency of that kind happens, we don't even appreciate ourselves how important tire chains are. They are very, very important. And the cases that you hear over the phone, that "I must have tire chains, I must have tire chains," are really pathetic, particularly when you haven't got them to give them to them. In or near Chicago we have the Western Chain Company and the S. G. Taylor 2504
Chain Company at Hammond. The blizzard that I was talking about occurred, I believe, in 1929. I don't believe Taylor was extensively in the manufacture of tire chains at that time. Western was. Those two companies could not have supplied that demand by themselves. They could not do it now (1310, 1311).

In answer to the effect upon our business of being required to sell all our types of chain f.o.b. factory without equalizing freight, I must break up between the three different methods that we use. On tire chains, if we were forced to sell our tire chains on an f.o.b. factory, which to us would mean f.o.b. York basis, it would be very difficult for us to have national distribution because the freight involved from York, Pennsylvania to the various distant points from York would make it so that they could buy from 2505
competitors at a cheaper price at f.o.b. their mill, and therefore we would limit our distribution to a comparatively small area (1312).

There would not be enough tire chain business in that area to begin to take care of our plant, particularly because in the city in which we are located there are two competitors, the McKay Company and the International Chain Company who are fairly large operators (1312, 1313).

As to the effect on our cost of manufacture and sale if we were restricted to that territory, our overheads and our investment would still be there, and it would make the price go up because our volume would be considerably smaller. If we had to sell welded chain f.o.b. our plants and not equalize freight with any other point, our business would also be limited to a certain area because the people in distant areas would buy from the other manufacturer rather than from us. On welded chain, our plants are in York, Pennsylvania and Braddock, Pennsylvania. Braddock is in the Pittsburgh area. It is about ten miles from the center of Pittsburgh (1313).

2507 If we had to sell our weldless chain f.o.b. mill with no freight equalization it would limit our sale to a certain area and therefore it would decrease our business, and with a decreased business our overhead would go up, our operations would be smaller, and it would cost the consumer more money. It would also tend to give us a monopoly of chain in our area and we might be able to get a good deal more money for it in that area because of the monopoly. But it would cost the consumer more money (1314).

If we had to sell on that basis our output would be a good deal smaller and our employees would be cut down (1314).

Examination by Trial Examiner Ballinger.

2508 What I have said with reference to our company would apply to all other companies (1314).

Direct examination by Mr. Kittelle resumed.

I think that we have about 2,300 employees at York today, about 200 at Braddock—200 to 250. That is near enough. We do not manufacture any chain at Bridgeport now. We do not manufacture any chain at any plant except Braddock and York (1314, 1315).

I have attended meetings of the Chain Institute. I started attending them around 1934, in the interest of tire chains. At that time I was located in Bridgeport, Connecticut. I did not attend any Institute meetings prior to 1934. Others who attended meetings of the Institute, from 1934 on, were Mr. A. P. Van Schaick, Vice President and General Manager of Sales; Mr. J. E. Seitz, manager of our welded chain department. At that time I was manager of our automotive department. Mr. Van Schaick is now dead. I think he died on September 7, 1938. I attended meetings of the Institute fairly regularly, but I would only stay, generally, while they were discussing automotive products (1315, 1316).

After Mr. Van Schaick's death, I was the official delegate of our company and was responsible for the actions of our company in any Institute meeting, on all types of chain (1316, 1317). 2510

When I was attending Institute meetings prior to Mr. Van Schaick's death the discussions that took place on tire chains in which I was interested involved specifications, shows, cooperative advertising, weather conditions throughout the country which governed the output of the chain sales, extreme emergencies that had happened which were very many interesting stories and useful information to us, past transactions, license arrangements with some of our licensed tire chain manufacturers, unit chain discussions in the way of patents and royalties, memberships in various Drive Safe highway departments—we have one of them here in Washington we contribute $500 a year to. Generally speaking, that was about the subjects covered (1317). 2511

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As to the discussions of past transactions, there had been price cutting over the published prices of various manufacturers on tire chains. I tried to get a fellow to stick to his published price if he could and not be so foo!

ish as to cut prices. Lots of times these fellows that were breaking into the tire chain business and comparatively new in it, they would believe a buyer that certain prices were being quoted, and oftentimes the chiseling buyer would fool the manufacturer into believing that there were more cut prices and more irregular prices being made than there were (1318).

I cannot give a concrete example of one of those conversations and what was said on both sides. It is a general conversation that we had at that time. I was not successful in getting these people not to cut their prices. They didn't quit. They would all run their own business, and I
2513 don't blame them (1318).

Examination by Trial Examiner Ballinger.

These price cutters cut the price in only some certain instances and they were not regular on it, and as a matter of fact, that was one of my arguments that I used with them, that they would get in trouble with the Robinson-Patman Bill (1318, 1319).

Direct examination by Mr. Kittelle resumed.

We never went below our published prices on tire chains—our regular line of tire chains as published.

"Mr. Steinhauer: The patented ones?
2514 "The Witness: Yes, sir, we did not cut our prices on the regular and patented tire chain" (1319).

Direct examination by Mr. Kittelle resumed.

"Q. Either one? A. Nothing" (1319).

The discussions in the Institute meetings after Mr. Van Schaick's death when we were interested in all three types of chain were, generally speaking, carried on in about the

same procedure as on tire chains. There didn't seem to be anything new about the discussions except that they were talking about weldless chain one time and welded chain another time.

We have sold below our published prices on welded or weldless chain. Some of our competitors complained to us about it. They would tell me that they had heard that we had sold at a certain price in a certain territory. Oftentimes I would tell them that they had better go back and check the records. Sometimes we did and sometimes we had not (1319, 1320).

We did not abandon the practice of cutting prices below our published prices if we had a fair reason for cutting them. A fair reason would be to meet competition of some other competitor (1320). 2516

I was influenced by things that were said at the meetings to the extent of analyzing again the good policies for the company and the good standings for our company and the sound policy in merchandising that should be carried on. I did not feel that I had committed myself to any competitor to do anything. No competitor had told me that he would stop price cutting. The price cutting, as a matter of fact, did not stop after these discussions. This price cutting and these discussions took place right up to—well, I would say 1941. In '40 and '41 they began to thin down (1320, 1321).

"Q. And the beginning, of course, as far as you are concerned, was the time you began to attend the Institute meetings, is that right? I mean, that is when they started as far as you knew. A. When they started? I don't exactly understand your question. 2517

"Q. Well, I asked you what the period was when these discussions on this price cutting took place and you gave the end of the period, and I wondered what the beginning of it was. A. Oh, the beginning was at the time that I started to attend Institute meetings" (1321, 1322).

As to the cause of the termination of discussions in 1940 or 1941, even before we started to enter World War II, Canada drew very heavily from the United States, and Canada would take all the chain that the United States chain manufacturers could produce for war purposes and to send to England. The Canadian demand began to show itself as early as the latter part of 1940 (1322).

We did manufacture a substandard tire chain. Our company first did that back in the early days before I came with them. The name of the chain was Rid-O-Skid. It differed from our regular Weed Brand tire chain in that it had no finish, lighter gage, unhardened cross chains,
2519 lock link side chain (1322).

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As to the comparison of price on these Rid-O-Skid chains with our regular Weed Chain, the prices I have in effect were 30 x 3½, $2.65. That made it about half the price because we were selling 30 x 3½'s for $5.00 and that price is $2.65 for them, list price. It was about half the price of our regular chain. We continued selling these Rid-O-Skid chains until about 1928 or '29, '30, right in there. I testified that these Rid-O-Skid's were being sold when I came with the company in 1914. The purpose of selling them at that time was for those to whom the cost of a tire chain was a chief consideration. For them we made up a cheaper grade chain that was good on soft roads, could be used for sand chains, could be used for mud chains.
2520 In the snow belt area where they needed a better chain, where chains were more in demand and you used them more days a year, we advocated our better chain (1324, 1325).

As to the influence of competition back in 1914 in putting out these chains, we were afraid, at certain times during that period when we held exclusive manufacturing rights on account of the patents, that somebody might

break through on it, and the Rid-O-Skid chain was also used in case of anybody breaking through on a patent. We had a cheap chain also to take care of that type of demand. When I say "break through on the patents" I mean break our patents. We didn't lose any sleep about it because Mr. Duncan took care of them (1325).

At certain times during the period of the more recent depression, 1935 to 1940 or '41, we had second grade or substandard type of tire chain. It was known as the Amco Chain, representing, as a name, American Company or American Chain Company. We put them up in a plain white bag with black letters. It was another type of chain that we put up in a red bag. It did not have a brand on it. It was a plain red bag and black letters. It was known in our organization privately as the Russian Red, and we placed it in various spots over the country where competition was the keenest, where price cutting was going on. We didn't give it to the other fellow; we gave it to our jobber to compete with some of the other fellow's foolish prices (1325, 1326).

We had a published price schedule of published prices or discounts for our Amco brand of chain (1326).

"Q. How did that compare with your regular, approximately? A. I would rather refresh my mind on that, sir, before even guessing at it.

"Q. Was it higher or lower? A. Well, it was lower" (1326).

Our published price schedule or published discounts for the red bag chain were only in bulletin form to the salesmen where we wanted to hit certain districts. It was not circulated to the customers at all. Our salesmen always sold all our products at the prices we told them to. They did not have any authority to deviate in any of their prices that we gave them to sell our goods at (1326, 1327).

Our discussions of past transactions involved both welded and weldless chain. They were more frequent on

welded than on weldless. They were more particularly on pump chain in the welded and trace chain in the welded. Somehow or other, the items that the irregular prices are made on more frequently than on any other commodity were those (1327).

You can take certain sections over the country. Some of our competitors used to run short of business and make a carload of five-ring cow ties and send them to certain sections of the country whenever they weren't busy. They would make up that carload and send them up in that section (1327).

That was always at an irregular price, different from their published prices. I can give an illustration as to how
2525 far down the price cutting went on pound chain. We had a price of 33⅓ off. Our salesmen sent in evidence and invoices and copies of quotations where they were being sold at 33⅓ and three 10's. On trace chain, when our discount was 20 off, there would be 20 and 10 and 5. Cow ties were generally set on a net basis, but I remember them taking such terrible prices as 92 cents a dozen for five-ring welded cow tie, malleable swivels and malleable toggles (1328).

Mr. W. T. Morris is our recent president of the American Chain & Cable Company who died a year ago last February. I had discussions with this Mr. Morris about price stabilization in connection with this price cutting. Sometimes in our industry the prices still would be up, but still
2526 the prices made by some of our members would go down, and it was very, very foolish. Our discount was 33⅓ off, and irregular prices had been coming in from all over the country and prices went down to as low as 33⅓ and three 10's—and I am talking pound chain only now. Orders would come into our factory and the order entry department would bring them to Mr. Seitz and myself and they wouldn't know what prices to put on them (1328, 1329).

Things became so chaotic that we ourselves didn't know how to run our business. I went over to New York and discussed the situation with Mr. Morris, told him exactly the conditions, and Mr. Morris wanted to think about it for a day or so. He finally told me. He said, "What do you want?" I said, "We want stabilization. We want stabilization so that the jobber will have confidence in ordering a few carloads of chain" (1329).

By Mr. Steinhauer.

This was around 1939 as near as I could figure. We wanted stabilization so that the jobber would order material from us with confidence and not only what wasn't 2528
going to drop out from under, so that he would stock our merchandise. Mr. Morris finally told us to publish a list that was as low as any prices that we had heard about and go 10 better (1329).

Well, I said, "Mr. Morris, that will put us way, way, way in the red.

"Well," he said, "you are asking for stabilization, and that is the only place that I can see where you can start." He said, "Let them know you mean business" (1329, 1330).

Well, I thought about it for quite a while, knowing that I would get the dickens if our department came up in red ink, and I finally pleaded with him and we published a price of 33⅓ and three 10's instead of four 10's. That is, he gave in finally and said that he would rather see the 33⅓ and 2529
four 10's, but he said, "It is okay to go to 33⅓ and three 10's." I had a good many meetings with Mr. Morris on subjects of that type (1330).

Direct examination by Mr. Kittelle resumed.

I did not say anything to any of our competitors about putting out that new price of 33⅓ and three 10's before it

went out. What would I tell them for? They would all be doing it, and it was a good thing to get it out on the table and see where we go from there (1330).

One of the things I have mentioned that was discussed in Institute meetings with our competitors was the question of costs. We had many talks about costs. It is the backbone of your business, increased freight rates, increased labor rates, increased raw materials, increased boxes, increased coal, excise taxes. They drive you to drink. There were lots of discussions regarding cost. Costs were nearly always going up. As to whether there were any discussions with competitors at these meetings as to the price
2531 level in relation to the cost, that is, the level of published prices, some of the members would say they didn't know how long they could stand it. There would be other remarks that "My bank account is getting awfully low," and "Baby can't have another pair of shoes," and what not. That was about the line of the conversations (1330, 1331).

I have said on those occasions that we are going to stand it as long as we can, but when we have to, we would do something about it. I wouldn't care to tell them what we were going to do in terms of the price we expected to make. They would know as much about our business as we did. I would not say what we were going to do (1331, 1332).

"Q. You have not done that?, A. No, sir.

"Q. Now, when your company makes a change in its published list price or published discounts, will you please
2532 describe just what the internal procedure in your company is, how the thing first starts and who makes the decision to do it, and then what happens. A. Well, what causes an increase in your costs? The increase in your costs depends upon the price of billets or rod or wire. Increase in your cost depends upon your labor, your freight, your coal. When you find the pressure is getting a little bit too tight, and you always have spot costs constantly, why

you begin to make a study of it, and when you find from your monthly report that you are getting pretty close to the red figures, you know you have got to do something, particularly when you get an added increase.

"So we have some spot costs made in several of our lines and we have a conference and we finally decide we had better study it a little further, and we have some more costs and trials made. In the meantime, another sheet comes in and the brass hats in the front office begin to tell you you are getting a little bit close to the boards, and we have another conference and we finally decide that we will put an advance into effect.

"When an advance, a serious advance, is put into effect, 2534
we figure the cost on the new basis, of practically our complete line, and after that cost is figured, new prices are set up, and when they are set up on any of the lines they are generally set up in Bridgeport. They are set up at York, I mean, and sent to our sales promotion department in Bridgeport. They print them up and one of us will go to Bridgeport and check the proofs, or sometimes they mail the proofs down to York and they are checked there and a lot of telephone conversation back and forth.

"Finally the prices are ready for mailing. A letter of transmittal goes with these new prices in mailing, and we try to send that letter out two or three days before the effective date. We generally mail our price sheets to the trade in the United States within an area of three or four 2535
days, starting to mail to the West Coast first and then bringing on to the East Coast, so that they will all get them at practically the same time. Often we take advantage of the Saturday and Sunday so that they get them out on Monday morning" (1332, 1335).

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When we change our published prices, we try to mail them so the jobbers will get them at least a day ahead of time so as to give them a little chance to fix their prices up. You can't say new prices are effective on a certain date and not give the jobbers the advantage of also adjusting their prices, because generally if the jobber gets an advance he will adjust his price on hand because he has to have a cushion to come down on when he goes up (1334).

Examination by Trial Examiner Ballinger.

Those price sheets are mailed to our customers. We also
2537 mail them to our competitors, but our competitors in 100% of our business are also our customers. They buy from us (1334).

Direct examination by Mr. Kittelle resumed.

I believe that every one of our competitors buys something from us (1334).

As to how long the process I have described takes, of changing a published price list in our company, from the time the decision is first made to do something until the price list goes in the mail, it depends upon your conditions which you are faced with, but you couldn't do it in less than a month, except if you wanted to go slipshod through the thing you might do it in three weeks or two weeks, but
2538 a study of conditions in our chain business would take you a month to decide what you were going to do or where you stand (1334, 1335).

During this period of time before our lists are put in the mail, we do not have any discussions with our competitors as to what we are doing and what is going to happen. We have never had any such discussions. Why, we are not going to tell them what we are going to do. But after we put the price lists in the mail, we send them to our com

petitors as well as to our other customers, and it is the right way to do business (1335).

As to whether or not we take any particular precautions to prevent information of what we are going to do getting out ahead of time, the only people that know what we are doing about it are most intimate people in the cost department. They might have a suspicion of what you are going to do because you are asking them for so many costs, new costs. Or in our sales promotion department or in our own sales department at York we don't take any particular caution as to locking them up in a jury room or anything like that, but we have confidence in our men and girls employed that they don't go tell our competitors about it (1335, 1336). 2540

I don't think we ever made an increase in our published prices when there had been no increase in our costs. It doesn't stand to reason that we would do a thing like that (1336).

As to who in our company has the final decision as to whether or not the price on weldless, welded or tire chain is to be changed, we decide at York and make a recommendation to either our president or executive vice president and they pass on it finally, although 99 9/10 per cent of the time they take our recommendation (1336).

I have had conversations with Mr. Merriman about past transactions. As to the nature of those conversations, he would call up and say, "I hear you did so and so and so and so. Will you look it up and see what you did?" By 2541 "so and so" I mean, "I hear that you cut a price 10 per cent down in Memphis," or in New Orleans or in North Dakota or what not. Again, I would say, "Well, I'll look it up." If I would find there was a good reason for it and I didn't want to start a fire, I wouldn't call him back. If I had some wonder about it, I would call him back and try to get what information he had (1336, 1337).

But generally, when we cut a price we put it in the file, and again I want to tell you we have always been fearful of the Robinson-Patman so we put in a file of why we did it. I don't understand Robinson-Patman yet, and I don't know whether any of you lawyers do, but I have always been afraid of the darn thing. But we always put a reason in our file why we did it so that we could refer back to the reasons, and sometimes there were reasons I would just as soon tell Mr. Merriman, and sometimes there were reasons I didn't care to tell him (1337).

I have called on Mr. Merriman to inquire into some of our competitors' cut prices. If you wanted to have a little
2543 fun sometimes you could fill his office full of things and start a little fireworks in the association, and sometimes it was serious and sometimes it was just for fun. Sometimes he would give you some of the most ridiculous reports when you had the answers ahead of time, and you just put in a test case once in a while to see whether it came out white or black (1337, 1338).

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I have no customers that I regard as my own. Competitors have tried to take customers away from us and they have succeeded. We have tried to take customers away from our competitors and we have been successful (1342).

"Trial Examiner Ballinger: You just attempted to
2544 take customers from one another, is that it?

"The Witness: Yes, sir. A great game, and you get a lot of satisfaction making a home run or a hit once in a while" (1342).

Direct examination by Mr. Kittelle resumed.

On welded and weldless chain our experience has been, with respect to the amount of price differential between

competitors necessary to take a customer away, that 5 per-cent during good times isn't serious, because when a jobber changes his line—well, let us take weldless. That is quite a line, and you have a lot of different sizes and types (1343).

When a jobber puts that stock in his place, he has to have stock records; he has his cards; he has his inventory; he has to print them in his catalog, and the trade-names—and what not. And then, attending jobbers' meetings, this manufacturer will have his salesman there, showing the advantages of the particular line. Your salesman will show them why you pack it in certain ways, why you branded that color on it, about the labels on your boxes, 2546
et cetera (1343).

So, when another man comes into weldless chain and he says to the jobber, "I will give you a 5 per cent better price", the jobber immediately figures—or the purchasing agent and maybe stock keepers—he may figure, "I had better talk to our sales manager about this," and he does, and the sales manager says about it, "Boy, that is going to be a lot of trouble, to have two lines of stock, two classes of inventory, two of everything, and our salesmen are going to get everything mixed up. I don't think we had better do it for 5 per cent" (1343, 1344).

Or, he is liable to come back to you and say, and you think of him as your friend when he does, he comes to you and says that he has this 5 per cent lower offer, and, "I will give you an opportunity to meet that price" (1344). 2547

We could stand 5 percent difference in general times upon weldless chain between our company and some other company. As to what I meant by "good times", in times of depression you get your shoes half-soled and then you patch them. But, in times like these you don't. Now, 5 percent in those depression times looks like a lot of money; 5 percent in these times that we are living under today is

O.K. The reputation of your company will carry that much lots of times. And I think the same thing holds good in welded chain (1344).

In tire chains, you have more of a brand name and you have a different picture there. You have an advertised brand name, and in advertising that brand and also the good qualities and the good talking points you have around your tire chain, you have an easier chance at holding business at 10 percent, even, differential; but, again, that same inventory trouble and all is present with a jobber when he considers changing lines (1344, 1345).

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2549 One of the chief reasons the American Chain and Cable Company selected York, Pennsylvania as the location for its plant is because of the purchase of the Standard Chain Company; that had sizeable plants there when we bought them. Then we found out, when we purchased them, that labor was good, power was good; there was a good labor market; they had pride in their product which they turned out; they were conscientious about their operations. They had a little rivalry between themselves in different departments as to who could turn out the best goods (1345).

Our power was very cheap at York. We had hydro-electric power that was supplied us; and it was all-American labor and we enjoyed operations in York very much when we moved into York (1345, 1346).

2550 There was another thing about it. It is an agricultural center, and there most of our workers, probably 70 percent of them, came in from the Counties, most of them owned their own farms—little farms, places around there that they liked to work. They would work for us for a certain number of weeks out of the year or a certain number of months out of the year; but other times, they wanted to go back and work on their farms. We tried to schedule

our work so that it would blend in with the periods of the year when they were either planting or harvesting (1346).

We could do this on all types of chain in the olden days when we were serious about working closer with our workers, more serious than we are today. It was more of a family gathering than it is today, with our workers (1346).

We have 5, 6—8 buildings; 8 or 10 buildings in our York plant (1346).

• • • • • •

I can tell you about the freight equalization plan referred to in several letters in evidence—among them, Commission's Exhibits 127 and 129 and possibly some others— 2552
which was in effect during the time of the Shirley, Olcott and Nichols arrangement prior to October 15, 1942, which is described in the stipulation (1348, 1349).

At that time Shirley, Olcott and Nichols represented a group of manufacturers before the Treasury Department. That firm secured the contracts from the Treasury Department. Naturally, the Treasury Department would send that firm the orders for the chain—these were all tire chains. When the orders were received, Shirley, Olcott and Nichols would allocate them to one of the manufacturers that was in that group. In order to see that one manufacturer did not get all the near shipments—because they were sold with full freight allowed—and another manufacturer get all the parcel post shipments that were to go 2553
to Seattle, Washington, or what not, we asked the firm to allocate those orders somewhat in proportion so it would be fair to all manufacturers (1349, 1350).

He did that, I am sure, to his best ability. He carried it as such until one manufacturer asked that an account be made. At quite a bit of trouble and expense an accounting was made and out of an appreciable amount of business one manufacturer got a rebate of $12.14. He was blamed of it and sent it back to Colonel Shirley (1350).

It was a case of seeing each manufacturer in the whole picture was allowed the same proportionate amount of freight, so that one manufacturer shouldn't have to send parcel post all the way to Seattle, Washington, and another get the shipments to the District of Columbia. That freight equalization plan had no relation to what we have referred to as equalizing freight under the weldless chain method of selling. It had nothing to do with weldless chain. We allowed full freight on tire chains to any place in the United States (1350).

* * * * * *

2555 At Institute meetings where we were all assembled, generally most of the parties that were concerned in the Shirley, Olcott and Nichols agreement were in attendance, probably, with the exception of Hodell Chain Company. So, naturally, while we were all in one town or while we were all in one hotel, we would have a private meeting. By "we" I mean the licensees who were concerned in the Shirley, Olcott and Nichols plan or arrangement, that is, the people who were parties to it. No other people would be in attendance (1353).

* * * * * *

2556 There are manufacturers of welded or weldless or tire chain who are not members of the Chain Institute. They are Hodell Chain Company, in Cleveland, Ohio; Carroll Chain Company in Columbus. They make fire welded chain. United States Chain Company in Chicago. They make tire chains. The Dixon Chain Company at Dixon, Illinois. They have made both proof coil chains and tire chains. There are other companies: Eastern Chain Company of New York City. And, there is another one up along the Hudson. I forget its name for the minute; they make welded chain. Eastern Chain Company makes welded sash chains. The other company up along the

Hudson makes welded chain, heavy welded chain, fire welded (1357, 1358).

To the best of my knowledge, that is about the situation on the chain manufacturers throughout the country on the type of chain that we manufacture. There are other types of chain, you know (1358).

"Trial Examiner Ballinger: Mr. Witness, what proportion of the chain business do these companies receive of the total?

"The Witness: It would be only a guess, sir, but I would say that the members of the Institute probably make 80 percent of all of the chain made in the United States, of the types that we make; there are other 2558
kinds of chain, sir" (1358, 1359).

Direct examination by Mr. Kittelle resumed.

As to the names of the manufacturers of sash and kindred chain that are not members of the Institute, you know, that is a pretty hard thing to do, because I don't know the names even of the ones that are in the Institute. I should know, but it has been a very unimportant line in the Institute. I know Turner and Seymour are members. I know Russell is supposed to be, but he is hardly ever around anywhere; and Corbin makes chain, but that comes in again, with that sash chain that goes with builder's hardware. I should be better posted, but I don't know (1359). 2559

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As to how long these nonmember manufacturers have been in business, Hodell Chain Company goes further back than I do. I don't know how long he's been in business. Carroll Chain Company, as I remember, was a reorganization and a new management took it over when they were having trouble, and somebody from the bank came in on it.

I'd say that was sometime between 1935 and 1938 to the best of my judgment (1367).

As to newcomers within the last fifteen years among those outside, non-Institute members, manufacturers of chain, Dixon and U. S. are absolutely newcomers. A good many of the other members in the Institute have expanded. I have no official knowledge of those that have expanded. Their activities though, seem to be more, and I see more of their goods in the field. To try to name them would be to guess rather than facts (1367, 1368).

• • • • • • •

2561 Our company has furnished to the Chain Institute from time to time statistics on our tonnage or volume of chain business. That is broken down by types of chain. The statistics we get back from the Institute as a result of that, is our percentage of the total. We get the total back, and we get our percentage of the total, and we get our percentage compared to a year ago of the total, and we get the 12 months' total, the percentage of our own (1404, 1405).

By the "total," I mean if you are taking pound chain, if we send in two million pounds and the other fellows send in their tonnages, the total tonnage might come to 20 million pounds in a month, and then we know our total that we sent in, and they give us our percentage. The total is for the Members of the Institute. The trend in our percentage of the total industry tonnage of welded chain during the

2562 past 15 years has gone down. Our tire chain percentage has gone down. Our weldless chain percentage has gone up slightly (1405).

"Q. Mr. Kirkpatrick, do you receive from the Institute any figures of what the volume or percentage of your competitors are? A. No, sir. Well, the total, yes. All of our competitors.

"Q. Total industry tonnage? A. Yes, sir" (1406).

We do not know or learn from these figures what any particular competitor has done in the way of tonnage or percentage (1406).

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Direct examination by Mr. Duncan.

The reports that we have received from year to year as regards to the total output of the membership in the industry show that the total increase has continually gone up. The total tonnage has gone up in tire chains, in welded chains and in weldless chains (1411).

Part of my duty is to keep track of the operations of our competitors. We have acquainted ourselves as to the buildings in which they operate. I have been inside some of the 2564
buildings of our competitors and I have been outside some of them. Some of them wouldn't care to have me visit them, but I have driven around them to see their expansions (1411).

I have observed the building space of our competitors in the tire chain business in the past ten years. I have seen none of them decrease, but I have seen them expand. I have seen market expansion on the part of some of our competitors. They are Peerless Chain and International Chain. They are the two that have made the most additions in their plant (1412).

I know the International. As to the increase in the size of their plant in the past ten years, in the paper the other day in York it described a new building they were contem- 2565
plating putting up because of expansion of their business. It amounted to approximately a quarter of a million to three hundred thousand dollars for the building alone. As to the buildings already erected and with respect to the increase of their manufacturing space, I know where they used to have their warehouse— They do not conduct their

tire chain business in a separate building. All of their chain business is in one building (1413, 1414).

* * * * * *

As to the building space in York, the buildings, the space that he formerly used as warehouse space, has been taken up in expansion of his manufacturing facilities. And latterly he has stored his wire and rod out in the fields. His business has been so good that as fast as he manufactured his product he shipped it out, but realizing that times are changing and he needs warehouse space, he planned to put up a $300,000 or a $250,000 new building (1414).

2567 "Mr. Steinhauer: Just a moment. I'd like to ask him how he knows that. Is that to your own knowledge?

"The Witness: Mr. George Campbell, president of the company, told me about it, and it was also published in our local paper. * * * He is the existing president of the International Chain Company" (1414, 1415).

Direct examination by Mr. Duncan resumed.

As to the Peerless factory and my observation of increase or decrease in its size, I have been to Winona, and I have seen the buildings, which was an old brewery across the street from their present location, and that building is now operating as a chain plant. They have increased the num-
2568 ber of their buildings by taking the old brewery which was across the street and converting it into a manufacturing plant for chain. Their space has been increased by 50 per cent (1415, 1416).

I have been familiar over a period of ten years with the Nixdorff-Krein plant at St. Louis. I would say that they came into the tire chain business somewhere around 1950 with the brand of Elephant Brand. I cannot tell, I do not know whether they have increased or decreased their man-

ufacturing space. I have not visited their plant with that thought in mind (1416).

I do not know about the Western Chain Products Company plant. I have only seen the Western Chain Products plant from the railroad as I have ridden by (1416).

I am familiar with the St. Pierre plant at Worcester. I know that his plant has been increased • • • (1417).

It is part of my duties to keep track of the financial standing of our competitors in the chain business. I do that about once a year when we get a special report from Dun and Bradstreet on all of our competitors. Those special reports are studied very carefully, and it is part of my duties to do that. I am familiar, from the study of those 2570
reports, as to changes in the financial standing of our competitors in the chain business. In those cases where public reports are made by our competitors showing profit or loss statements, their earnings, I have obtained and studied them. I have made this study of the financial ratings of our competitors from 1938 to the present time. We have noticed particularly the financial standing of three companies in the industry whose statements are continuing to increase (1417, 1419, 1420, 1421).

As to whether we have noticed any difference in the rate of increase in financial rating between our competitors during this period from 1938 on, the Dun and Bradstreet rating isn't so much of an indication to us as to the overall picture of the ir financial status as that which we get in a special report from Dun and Bradstreet (1421). 2571

The special report shows earnings and profit and loss if they give it to Dun and Bradstreet. Sometimes people refuse to give it to them (1421).

"Q. Now, from the study of those special reports from Dun and Bradstreet, what have you observed as to the comparative increase or rate of increase of different competitors?

"Mr. Steinhauer: Amount of business, you mean?

"Mr. Duncan: In the chain business.

"The Witness: The three of them that stand outright are Hodell Company, the Peerless Chain Company and International Chain Company, as continuing to increase their business and to increase their financial standing" (1421, 1422).

Those companies are among those that I have referred to in my testimony as having a "B" rating in the industry (1422).

2573 "Trial Examiner Ballinger: What is a 'B' rating?

"Mr. Duncan: The 'B' rating that I am referring to is where, because of their size and lack of advertising, they were selling their product at a lower rating during NRA and afterwards than the product of some of your larger competitors" (1422).

That rating was a carryover of the NRA, where they filed their prices at a lower price than some of the other manufacturers, and then they were known as a "B" company or a "B" group. * * * The others of the "B" group are Cleveland, Taylor, Western, Nixdorff-Krein and St. Pierre. All of these except Cleveland are relatively small manufacturers (1422, 1423).

There certainly has been competition between us and
2574 other manufacturers in the tire chain branch, in the welded chain branch and in the weldless chain branch since the NRA went out of action down to the period when the advance effects of the war came into action toward the end of 1940 or 1941 (1429).

"Mr. Steinhauer: Just a moment. I want to ask him what kind of competition he means.

"Mr. Duncan: Price competition.

"The Witness: There certainly has.

"*By Mr. Duncan.*

"To what extent, sir? Describe it very generally.

"Trial Examiner Ballinger: I'd like to have something more than a general description of this.

"The Witness: Well, your records which we have gone over since we have been here—well, take welded chain first—will indicate that our prices were reduced when raw material and labor was going up. Those prices on welded chain were reduced because of competition. Competition continued to give extra tens and extra tens, until finally a price was established by our company on welded chain at 33⅓ and three tens, which 2576
was way under the price we had been selling it for. We did it for the benefits of a stabilization market. We did for a stabilization market of our own products (1429, 1430).

I think that I have already described the conditions with regard to competition from the end of N.R.A. to the beginning of 1941, with respect to the weldless chain industry, illustrating with tie-out chains, 2/0 Tenso chain in 250 feet boxes. That is what is known as weldless chain. I have covered the subject of the continuance and the extent of the competition as to welded chain, covering it by the pound chain lines, which are illustrative of welded chain. As to tire chains, I think the Red Tire Chain—the Russian Red 2577
Tire Chain story, I think that illustrates the competition that we had on tire chains (1432).

As to competition in style or as to the improvements on these devices between competitors during this time, competition as far as quality, dress and appearance is continually going on among all manufacturers. It is also going on as to improvements in the articles themselves; and the packages under which the materials are shipped; and the

labels; even as to how they are displayed. There has been too much competition for me between these various manufacturers during this period as to service to the customer. It has given me gray hair (1433).

Examination by Trial Examiner Ballinger.

I stated that the gross chain tonnage of the entire industry had increased, in recent years. There are manufacturers engaged in the manufacture of chain that are not members of the Chain Institute. I am familiar with the increase on the gross tonnage of those manufacturers who
2579 are members of the Institute. I am familiar with the gross increase in the tonnage of some of those manufacturers who are not members of the Institute. Others I am not. I would say that the increase in gross tonnage of the manufacturers who are members of the Institute has been in proportion to those not members of the Institute. I would put them in the same class (1433, 1434).

Cross-examination by Mr. Steinhauer.

I am acquainted with the total tonnage of all the different respondents. I am not acquainted with the increased tonnage of individuals (1435).

"Q. I see. Now, what was American's percentage, as far as the amount of increased business is concerned, com-
2580 pared with the other respondents? A. Well, of course, our tonnage is pretty large and——

"Q. I see, you mean in percentage, of course, it would not mean so much. A. The percentages, naturally—well, a 10 per cent drop in our tonnage means an awful lot to us, where a 10 percent drop in the tonnage over-all of maybe one of the smaller companies would not be so important or so much, percentagewise.

"Q. That is right. Now— A. So, you have got to study those percentages, of course, quite carefully, when you are talking about percentages" (1435).

These figures mean an awful lot to us when you see the big percentage we dropped. • • • I don't know the individual tonnage increases of the other companies. I judged by the total tonnage of the industry (1436).

"Q. But, you have been testifying to the effect of the increase of tonnage in the individual plants. I——

• • • • • • •

"Mr. Kittelle: He testified as to the expansion of the other plants, that is all.

"The Witness: Expansion of the physical plant. 2582

"*By Mr. Steinhauer.*

• • • • • • •

"Q. • • • Have you not made intimation in your testimony that your increase in business has not amounted as much as your competitors' percentagewise? A. I will say that the increase in our business has not amounted to as much as our competitors'.

"Q. That is, all the competitors, or any one of them? A. I am talking about percentagewise" (1436, 1437).

• • • • • • •

As to whether the consumer would be glad to get a lower price on tire chains if he could; on them we have full freight allowance; otherwise, your consumer in a very distant point would pay so much more for a pair of tire chains than a nearer consumer—he would be penalized. Our mill net to our customers is naturally less when we ship to San Francisco than when we ship to York. It is about an overall of 5 percent difference. I am not comparing San Francisco and York. I am comparing the average. As to San Francisco, I would have to consult our freight rates and 2583

divide the weight of a pair of chains in order to give you that. The five percent figure I got from actual experience. It shows in our cost department figures. Our detailed costs I don't think should be exposed to the public (1438, 1439, 1440).

"Mr. Kittelle: Let me suggest that in the case of Mr. Bond the same question was asked and his counsel expressed a willingness to have the attorneys for the Commission look at those figures to satisfy themselves of the correctness of the statement, but he did not want them spread on the public record subject to
2585 observation of his competitors.

"If the Examiner please, I think that the same consideration should apply to this case, that they might be furnished for the attention of the Commission counsel and——

"Mr. Steinhauer: For the attention of the Examiner also, and the Commission?

"Mr. Kittelle: If, after you have seen them, you feel the Examiner should see them. But if it is only in the interest of confirming whether 5 percent is the correct figure, and that is all, then only Commission counsel need examine them, and if 5 percent is not the correct figure, then the record can show the figures; we can stipulate to correct the record" (1440).

2586 *Cross-examination by Mr. Steinhauer resumed.*

As to whether consumers of welded and weldless chain would be glad to get a lower price than the one we are quoting from the basing point system, we are always mindful of the consumers, and of course we sell more tire chains or pound chains and more weldless and welded chain when we can reduce the price; but I don't know of any other system that we have, how we can reduce the prices. I don't

know how a consumer, when you are dealing with a national company can get a lower price, if you make it f.o.b. mill. The consumers around the mill would not support our plant (1441).

Our mill is built to produce chain as economically and as cheaply as we can produce it. As to whether we have the price picture in mind, the price we are going to get when we erect a mill, the pricing system, we wouldn't erect a mill if we didn't know, or if we didn't think we knew, that we could make a profit (1441, 1442).

"Q. All right. So, when you erected one of these mills with the Pittsburgh plus practice in effect on welded chain, you may have overreached yourselves on one of your objectives by not having enough consumption there, isn't that right? A. Well, we never erected the plant for a welded chain commodity. We acquired from Standard Chain Company" (1442). 2588

We did not enlarge from time to time from the welded chain standpoint. We enlarged on account of the tire chain standpoint and the weldless chain standpoint, which was a consolidation. We acquired the Standard Chain Company at York, Pennsylvania, and from the chain department, pertaining to welded, we have not increased that plant. We have had the welded chain plant at York since the beginning of 1917. Before that time the welded chain was made by the Standard Chain Company of York, Pennsylvania, as far as we were concerned (1442).

In answering the question if we sold f.o.b. the plant, what would be the difference in the volume of business at York, I am supposing that everybody else would sell f.o.b. their plants. Under that condition we could not exist. If some other plant had too little production for their area, we would then be worse off because we have three large plants in a little town of 60,000 people, and we would get it in the neck quicker than anyone else would. If we put a plant 2589

elsewhere to take care of the welded demand, the size of plant that we got, we could not find any place where we could sell sufficient volume to keep a plant of that size in operation. That would cost a lot of money to us, and it would cost the consumer a lot of money (1443).

"Q. If you sold your products f.o.b. mill, what would be the result as to the area of your production, say from the York plant? Can you give me an answer to that? A. I am going to put you the question, just to see whether I understand it. You say that if we sell all of our weldless chain and our welded chain, f.o.b. mill, whether we would be restricted in production. Now, is that it?

2591 "Q. Well, in the areas of your production. A. Areas of production if we sold at f.o.b. mill

"Trial Examiner Ballinger: You mean the areas of sale, don't you?

"The Witness: Areas of sale, yes, sir. They would be at certain points—it would be governed by the location of our competitors. If you take York, on welded and weldless chain, we have a competitor in Trenton, New Jersey, which is a distance of approximately 150 miles on one side, and a competitor in Cleveland, which is a distance of 350 to 400 miles from York; and a competitor in Tonawanda, New York, which is right outside Buffalo, which is around 350 miles; that is around and about York.

2592 "Now, if we were selling f.o.b. mill, there would be a distance of approximately half-way between those competitive points we would confine our market to.

"Trial Examiner Ballinger: And the same thing would be true of all other mills, would it not?

"The Witness: And the same would be true of all other mills, and those mills in those sections would have more or less of a monopoly and they could charge what

ever prices they chose in there, until they charged so much that it would invite us in there. We would go in there, and they would reduce prices again, and we would be kicked out.

"There would be an unstabilized market continually and none of the factories could afford to keep enough machinery to satisfy the United States demand on chain—I mean the people of the United States.

"Mr. Dinkins: What you said about York would be true also of International Chain, wouldn't it?

"The Witness: I think the commissioner had that in mind when he said all other companies. It would hit us harder than any of the other companies." 2594

Cross-examination by Mr. Steinhauer resumed.

At discussions between ourselves and our competitors, we discussed selling methods (meaning prices) on closed and past transactions, not on present transactions. We have exchanged price lists with them. I don't look at that as discussing prices because we sell those people chain. I am talking about competitors. We sell our competitors chain, and they have to know what our published prices are so they can figure. Some of these competitors sell us chain and some do not (1446).

"Q. * * * You send them your price list; and then they send theirs back to you, don't they? A. They do not.

"Q. You mean that does not take place? A. It does 2595
sometimes, but as a general rule—we do pick prices up, we pick a great many of them up but as a general rule there is no general understanding that when they get our price they are in return to send their price in to us. I have asked them it [sic] at times" (1446).

As a general rule, we do not get back a price list without asking. And there isn't any of our competitors, I don't believe, that has to ask us for prices, because they are on our

mailing list, because they are customers of ours. We have asked them for theirs. If we ask them for those, it is because we buy from them, and if we do buy from them, then we have a right to get theirs (1446, 1447).

"Q. And you ask; and an identical price list to yours is returned to you, isn't that so? Do they go and copy them? A. That is their own business, how they make their own lists.

"Q. That is true, though, isn't it? A. Yes, sir, it is true, in the way that we have seen a good many identical prices. I don't know whether they are copied or not" (1447).

* * * * * *

2597 I testified that there were discussions among the members at meetings and elsewhere as to prices that were charged, and cutting of prices, by any of the members on closed and past transactions. The purpose of that was to get the members in line, to bring them down to stabilization of prices among themselves if that could be accomplished, but it also was a means of checking up on a lot of buyers that were in the field that were making false statements. There are two things in this field. One is a competitor that cut prices, and there is another, the chiseler buyer that will lie in order to obtain a better price. We wanted to get all the information on it—if you could stop it, you are a better man than I am (1452).

We did what we could with regard to stabilization (1452,
2598 1453).

"Q. That is right. Now, as far as Mr. Merriman is concerned, one of his duties was to see that the members kept together as much as possible on prices. That is true, isn't it? A. Well, he had no authority.

"Q. Of course, but he—A. Mr. Steinhauer, on any member.

"Q. Sure—A. But if he could use his influence—

"Q. He did. A. Yes, in the interest of good business, he did what he could.

"Q. That is right. A. But he had no authority over anything. We could all do what we pleased.

"Q. Sure. A. And we did.

"Q. Sure, but the effect of it was that if he could use his power to try to stabilize prices, he did, didn't he? A. Yes.

"Q. He did all in his power to influence that. A. Yes. And if he could influence any of the members of the Institute to discontinue cutting prices, why, I am glad of his influence.

"Q. But he did use that influence as far as he could, didn't he? A. He didn't accomplish very much in that direction 2600
with his influence, as far as cutting prices was concerned.

Q. Yes, but he did attempt it? A. Yes, sir" (1453, 1454).

* * * * * *

Cross-examination by Mr. Schroeder:

I testified about the increase in the manufacturing space of International Chain Company in York. I did not say that they took a warehouse and converted it into manufacturing space. I said that the space in their factory that they formerly used for warehouse spacing was now taken up with manufacturing and that they stored their wire and coal out in the lot. They had no place for their finished material and they were contemplating putting up a $300,000 plant, a building to use as a warehouse. I have been inside 2601
the new building to observe what was going on. They are making mostly welded chain products in that space (1455).

I testified in the case of Peerless Chain Company that they converted a brewery. I could tell you the brand because I had some of it (1455, 1456).

* * * * * *

I testified that they thereby increased their square-foot manufacturing space approximately 50 percent. As to whether they make chain products in this increased manufacturing space, I have not seen it since it has been completed, but I have seen chain in their place—chain-making machines in the place—in the new place in the old brewery. Peerless Chain Company's business is based around chain, but they make little contrivances for on top of an automobile to carry bamboo fishing rods, and they make special types of hooks to hang up boots when you go duck hunting and when you get your boots sopping wet, they hang upside down so they dry out easily. They make a lot—well,
2603 not a lot, but they make little contrivances like that to use in the country when you are hunting or fishing or sporting, where that sort of thing is going on (1456, 1457).

We got special reports from Dun and Bradstreet on three competitors, Hodell, Peerless and International Chain Company. It is our custom to secure reports continuously of our competitors because we want that financial information to go to our credit department so as to examine those things. These reports do not indicate the amount of chain business done by these companies. They don't say the amount of chain business, but they show their increased cash positions, their increased assets and decreased liabilities (1457).

I testified that their financial position had increased every year since 1938, I would say that they have. I will say that, without examining any of them recently. Generally they
2604 have increased during that period. The financial position of the American Chain and Cable Company has increased, generally speaking, since 1938, but it is on account of our over all picture. It isn't the Chain Division that has increased. What Peerless makes other than chain is infinitestimal comparatively. We are a member of a series of companies and our company has the same position as one of a group (1457, 1458).

As to whether the financial position of the American Chain and Cable Company in respect to chain and chain products has increased generally since 1938, we have that on the breakdown; our financial statement shows the whole company (1458).

As to whether we have that information for our competitors but do not have it for ourselves, I know what it is for ourselves; but I don't think our company would want me to declare it on chain because we don't have it on the breakdown on chain; we don't make it publicly. I won't say that it has increased because I think it is our own business in our individual company. Dun and Bradstreet couldn't give it to you (1458). 2606

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Redirect examination by Mr. Kittelle.

The term "price stabilization" has no relation in my mind to the level of prices, whether they are up or down. What I mean by that is, by stabilization, that everybody knows where they are at, that's the thing (1463).

When you go out to the country—much as you may not believe it, maybe—the jobber hates to see you coming in and offering a cut price to him, because he says, "Oh, he is cutting a price, maybe I can get a cut price from this other fellow. I had better see what all the other fellows are doing about cutting prices." I mean, he wants to see what they are doing, before he gives you his order (1463, 1464).

The result is that he is afraid to buy from you or from the other fellow, too. He is afraid to buy any more than he has to; his inventories run down and he buys from hand to mouth, and it is altogether an unsettling condition (1464). 2607

What I want to see is this, I want to see the jobber come in with an order for two carloads or five carloads of chain, and that is what price stabilization means, the jobber is not afraid to order; he knows what the situation is, where he stands. He knows that he isn't going to have to change

everything the next day. I am interested in the level at which it is established. What I get comes from the profits of our company, but I don't want it too high or too low (1464).

* * * * * *

The price stabilization which resulted from Mr. Morris' decision to put out a price list as low as any of the cut prices we found on the market, did not stabilize the price at a profitable level for our company (1466).

"Q. * * * Mr. Steinhauer had you describe generally the territory in which you could sell welded and weldless chain if you had to sell f.o.b. mill.

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"Mr. Kittelle: I take it in all your questions, Mr. Steinhauer, you meant selling f.o.b. mill with no freight equalization, is that right?

"Mr. Steinhauer: That is right" (1466).

Redirect examination by Mr. Kittelle resumed.

As to describing that territory where we could sell tire chains f.o.b. mill, our competitors on tire chains from the location York, would be Worcester, Massachusetts; Tonawanda, New York; Cleveland, Ohio; and two competitors in York (1466, 1467).

As to Chicago, that is away out of the zone. Chicago would have to take care of itself. We could not get by Cleve-
2610 land and get into Chicago. I forgot Newark, New Jersey (1467).

It would be a logical conclusion to state that the territory would be about half-way between your plant and those plants. Our tire chain business would go all the way down. I know of no place in the United States where we could take our plant and find sufficient tire chain business so we could keep it going on the basis Mr. Steinhauer described. The reason is because tire chain business is not always in the

same spot. Your normal tire chain business, where you can count on it year in and year out is what the Weather Bureau would state is the normal snow belt that goes up and down the country. You can see it on their maps. Now, of course, you get freak storms in Memphis; but basically your business comes out, across the United States, of that snow-bound area (1467, 1468).

"Q. If you were starting out tomorrow to follow Mr. Steinhauer's suggestion in selling your chain products f.o.b. York with no freight equalization or no freight allowance, what would your competitors do? Would they do the same thing, confine themselves to their own territory or keep on selling in yours? A. Well, they could not—I 2612
mean, they would confine themselves to their territory because they haven't any place where they would be penalized as much as we would, with three plants in York. Take St. Louis or take Winona, they would be the only ones who—" (1468).

We would not do this of our own free will; it is too foolish (1469).

We have had no occasion to discuss particular selling methods or delivered prices or whether they would be continued or changed or what not, because the existing methods were satisfactory to all concerned. The selling methods we discussed were cut prices from published discount sheets (1469).

"Trial Examiner Ballinger: And those related to 2613
closed and past transactions?

"The Witness: Yes, sir" (1469).

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2614 *J. E. Seitz—For Petitioners—Direct.*

J. E. SEITZ, called as a witness for the Petitioners, testified as follows on October 3, 1947:

Direct examination by Mr. Kittelle.

I live in York, Pennsylvania. I am connected with the American Chain and Cable Company, Inc. as sales manager of the welded chain department. I have been in that capacity since 1918. My office is at York, Pennsylvania where I have been since 1929. Before that my office was at Bridgeport, Connecticut (1473).

Prior to 1918 I was located or supposedly located in
2615 Pittsburgh, for the year 1917 as the local representative for American Chain and Cable Company, but I did spend most of my time in the Bridgeport office. I first came with the company January 1, 1917. Prior to that I was with the Standard Chain Company, Pittsburgh. I came with American when they bought Standard. I had entered the employ of the Standard Chain Company on August 1, 1901. I entered Mr. John C. Schmidt's office, who was then president of the Standard Chain Company at York, Pennsylvania, as a stenographer, and I continued in his office there for about three months, or rather until December 1st of that year when I was sent to South Harrisburg, or Lemoyne, Pennsylvania, to close the South Harrisburg Chain plant which was then owned by Standard Chain Company. I completed that assignment in May of 1902, and in June of 1902 I went
2616 to Pittsburgh in the general office of the Standard Chain Company, acting there as a stenographer taking dictation from both the president and the general manager of the company. Later on I became connected with the traffic end of it, and later on in the sales end of the company (1474, 1474-A).

I was in the sales end when American bought them out. The Standard Chain Company made only fire welded chain at the time I joined their forces, but later on in about—1906

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or 1907 we bought several electric welding machines, and from that we progressed, and by about 1911 I would say we had quite a few electric welding machines, and from that time on we produced electric-welded chain in considerable quantities, eliminating as time went on fire-welded chain plants that we had throughout the country (1474-A).

The Company besides welded chain made what was called harness hardware, squares and rings, bits for use on harness (1474-A).

We made no weldless chain at that time, nor any tire chain. We did manufacture chain for use in the manufacture of tire chain for the Weed Tire Grip Company, I believe it was called. And then later American Chain Company (1475).

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The plants of the Standard Chain Company were located at York, Pennsylvania. We had two plants at that point. Originally they were both fire welded, but later on one was turned into the electric welding plant. One plant at Carlisle, Pennsylvania, Braddock, Pennsylvania, which is in the Pittsburgh area, Mansfield, Ohio, St. Mary's, Ohio, Marion, Indiana, and Columbus, Ohio. We also had one at Sarnia, Ontario (1475).

I knew Mr. Frank A. Bond quite well at that time (1475).

All these plants other than York were fire-welded then. When American Chain Company bought the Standard Chain Company in 1917, to the best of my recollection they retained all of these plants that Standard had until after the close of the first World War. They then closed them gradually, because of the inroads of the electric-welded chain. I mean by that that we continued to make more and more of our chain electrically welded, and naturally discontinued the fire welding plants, with the exception of our Braddock, Pennsylvania plant and the Columbus, Ohio plant, which manufactured entirely fire-welded chain, and at Braddock we manufactured forgings. We also had at

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Columbus, Ohio an iron mill which supplied our chain plant with iron (1475, 1476).

In those days chain was made from both iron and steel. As I mentioned before, the chain at our Columbus, Ohio plant was, I would say, about 99 per cent made of iron, and at Braddock it was practically all made from steel (1476).

When we closed that Columbus plant we did not quit making iron chains. We moved certain of that equipment to our Braddock plant where we continue to make that same type of chain at the present time. When the Braddock plant was making iron chains we purchased some of our
2621 iron at our then associate company which was the Highland Iron and Steel Company at Terre Haute, Indiana. But we also purchased considerable iron from the Pittsburgh District. Most of our iron was purchased right in Pittsburgh (1477).

We purchased all our steel from Pittsburgh. I couldn't say, about 1901, how the Standard Chain Company was selling welded chain when I first went with that company, because, as I said before, I was in a little different department. But I would say from 1902 on I do know they positively were selling it on f.o.b. Pittsburgh, Pennsylvania basis. They are selling it on that basis to this day. Oh, I beg your pardon. Standard Chain Company kept on selling it on that basis until they sold to the American Chain Company. That was at the end of 1916. When American
2622 took over, they continued on the same basis. There has been no change in that up to the present time on commercial welded chain (1477, 1478).

I am quite familiar with the stud link anchor chain. The Standard Chain Company manufactured that at their Columbus, Ohio plant, and during the first World War made quite a lot of chain of that type. That was sold on an f.o.b. factory basis, f.o.b. Columbus. American now makes a

very small amount of it. After the first World War we disposed of most of our equipment—in fact, all of our equipment for making the heavier sizes—and therefore we are making only some of the smaller sizes, about one and five-eighths and smaller, for which there is a very small call at this time. The larger ships require much larger sizes than we manufacture (1478, 1479).

American sells this stud link anchor chain f.o.b. plant which, of course, is Braddock, in the Pittsburgh area. As to the competitors in the manufacture of stud link anchor chain, there's quite a concern at Chester, Pennsylvania called the Baldt Anchor Chain and Forging Corporation that make a forged stud link chain. The National Malle- 2624
able Steel Castings Company, I believe is the proper name, at Cleveland also make a cast chain. In the iron chain group, however, the McKay Company at McKees Rocks, Cleveland Chain at Cleveland, Woodhouse Chain Works at Trenton, International make some, some of the smaller sizes, and Taylor also makes stud link chain. Also Seattle Chain and Forging Company (1479).

I am not familiar with how these competitors sell that stud link anchor chain, whether it is f.o.b. Pittsburgh or what because, we don't get into that very extensively, and we usually figure on our cost plus basis and sell on whatever basis we can on that type of chain. The United States Navy makes this stud link anchor chain or they have it made at Boston in the Navy Yard (1479, 1480).

On the stud link chain that we had during the first World 2625
War—we built a plant at Norfolk, Virginia, where we employed a different type of help then than we have in the north, of a different color, and we had a lot of trouble, and were just about at the point of being able to manufacture the chain when the war ended and we disposed of the chain as scrap, and the plant was disposed of, but I can't tell you exactly how. But I know the chain was not very good (1480).

I am quite familiar with cold shuts and hooks. The welded chain department of the American Chain and Cable Company of which I am sales manager is the department which handled cold shuts and hooks. I am familiar with the matter of the selling of cold shuts and hooks f.o.b. Pittsburgh prior to 1940, about the middle of 1940, and then with the freight allowance of to February, 1941 when they went back to f.o.b. Pittsburgh and then about eight months or less later back to this freight allowance basis. The cold shut and hook proposition was one of the most confused that we had to deal with. We did for years sell that on f.o.b. Pittsburgh basis. Some of what we call the drop forging
2627 companies in the country manufactured cold shuts and hooks. And while we had a published price showing f.o.b. Pittsburgh basis we discovered that they were selling at freight allowed to various destinations in the country (1480, 1481).

We changed our price list and sold on an f.o.b. factory with freight allowed basis for a short time. The costs advanced, and we found we were not in a position to meet this condition, so we went back to the f.o.b. Pittsburgh basis so that we would not have to assume the freight. Again we ran into the competition, and in order to remain in that type of business we had to meet the prices that were quoted by the drop forging companies, which was on an f.o.b. factory freight allowed basis. That is the way it is today (1481).

2628 I have attended some of the meetings of the Chain Institute. I have attended some of the Code Authority meetings, and I have attended the meetings off and on since that time. I haven't attended all of them, but quite a few of them. I attended with Mr. Van Schaick up to the time he died and subsequently with Mr. Kirkpatrick, my boss * * * (1481, 1482).

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I did not have any conversations or discussions with our competitors at any time, whether when I was with Standard Chain or American Chain, right from the beginning, with reference to this method of selling f.o.b. Pittsburgh, whether it should be changed to something else or left alone or what. I couldn't conceive of any reason why I should have discussed the matter with any of our competitors. It seemed so logical and reasonable that you should sell on that basis, particularly in view of the fact that our plants were located in different parts of the country, and with our customers located all over the country. We couldn't figure how we could do any other way than to sell on that basis (1482).

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I have never overheard any such discussions among competitors. None of the officials or people, our associates, in the Standard Chain Company told me that they had any such discussions with competitors. None of my associates or superiors or people in the American Chain and Cable Company told me they had had any such discussions with competitors (1482, 1483).

The American Chain and Cable Company sold its welded chain throughout the United States. I would say from the Atlantic to the Pacific, and from Canada to Mexico, including Mexico and foreign countries as well as Canada. When we sell f.o.b. Pittsburgh from our plant at York, electric welded chain to a customer located in Pittsburgh, the customer pays no freight. He pays freight, but we allow that same amount of freight on the invoice, so he actually pays no freight (1484).

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As to a customer in York for welded chain, he pays the equivalent of the freight from Pittsburgh to York. He pays that freight to us because we show that on the invoice, and he pays that amount. But he pays nothing to the railroad company or to a trucking company, because we deliver it to him. In that situation we receive more than our list price from that customer by the amount of that freight.

In the situation where the customer is in Pittsburgh we receive less than our list price because we had to allow him the freight (1485).

"Q. I'd like to ask you what the experience of the American Chain and Cable Company has been as to whether or not on their total sales of welded chain they get more so-called phantom freight from the customer than they have to pay out in the way of freight allowances. A. They have to pay——

* * * * * *

"Mr. Steinhauer: Have you a record of that?

"The Witness: I haven't a record of that, sir, but
2633 I would answer Mr. Kittelle's question in this way: I know from the location of our York plant and where our customers are located and the amount of business that we do in various parts of the country that the allowance that we make or the amount that we have to allow is considerably greater than the amount of phantom freight that we receive" (1485, 1486).

Direct examination by Mr. Kittelle resumed.

In answer to the question why it is that there is a difference in the methods of selling welded and weldless chain —that is, one sold f.o.b. Pittsburgh and the other sold on what has been termed a multiple basing point method, I would say that when the American Chain Company, as was
2634 cited before, took over several plants located throughout the country making weldless chain, and they in turn competed with other companies in the country located at different cities also making weldless chain, therefore, they equalized on weldless chain with their competitors in various points such as Cleveland, Cincinnati and Bridgeport. Originally, of course, Bridgeport was our shipping point. Later that was changed to York, and then we continued to equalize with Bridgeport because of the Bridge-

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port Chain Company being located at that point (1486, 1487).

Now, as to the Standard Chain Company billing on an f.o.b. Pittsburgh basis, we having had plants—that is, the Standard Chain Company having had plants at various points in Pennsylvania, Ohio and Indiana, we established an f.o.b. Pittsburgh price, and so that when we shipped to, say, a customer in Louisville we might take his order and divide it up at three different plants, which I know very well was done (1487).

We might have equipment at one plant to take care of a portion of the order, and equipment at another plant to take care of the balance of it at a certain size, and therefore we figured that it would not be fair to the customer to charge them a different price if shipped from York than if shipped from St. Mary's, Ohio or vice versa (1487).

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And, in addition, at that time we were getting all of our steel from the Pittsburgh area, and we had to pay freight from Pittsburgh to whatever plant we manufactured the chain (1487).

We have different departments in our business now for welded and weldless chain. I am in charge of the welded department. I am quite familiar, however, with the weldless because we are right in the same building. Mr. Trevethan was in charge of the weldless until about 1941 when Mr. C. A. Puckett became sales manager. And about two years ago Mr. Trevethan was retired (1487, 1488).

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Cross-examination by Mr. Schrimsher.

I testified that one reason for the multiple basing system of selling weldless chain was American's desire to equalize with competitors who were located in different cities. I cannot answer as to whether or not American equalized freight in the case of weldless with the Peerless Chain Company in Winona, Minnesota. I am not sure whether

they consider them as a competitor on that item. I don't know what items of weldless chain that Peerless Chain Company makes. I am not capable of saying that, because I'm not familiar with their product on that line. As to the reason why American did not equalize in the case of welded chain as they did on weldless, the American Chain Company purchased the Standard Chain Company, who had at that time plants throughout the country and had established this basis of selling welded chain. And I am of the opinion that the owners of the American Chain Company probably realized that that was a very good way of selling that chain and didn't disturb it. I never heard any dis-
2639 cussion that it was not the proper way to do it (1489).

I know it to be true that, in the case of weldless chain, when another manufacturer had a different producing point —that is, different from American—and started manufacturing weldless chain, that American and the other companies in the business began to equalize with the new producing point. I have heard the testimony to that effect, and I am confident it is true (1489, 1490).

The multiple basing system used in selling weldless chain has not been static. The basing points upon which the different companies equalize have been enlarged over the years because originally there were only two companies, gradually three or possibly four (1490).

As to why the companies haven't seen fit to equalize with other points in the case of welded chain but have stuck
2640 to the f.o.b. Pittsburgh basis, it wasn't considered advisable to get away from their standard procedure on that line which had been in effect since 1901. It seemed to be so entirely satisfactory that, as I said before, there's been no discussion in our company as to the necessity of doing it. It was a convenient basis, and it seemed to be entirely satisfactory with our customers, because in the long experience that I have had we haven't had any complaint on our selling on that basis. As to whether when I say "satisfactory"

I mean primarily to the manufacturer, I would say if it wasn't satisfactory to the jobber we'd get a lot of complaints. We get complaints on any other item or condition that isn't satisfactory, so that I would say that it must have been satisfactory to our trade (1490, 1491).

If we were to use our same basis that we have today, our same price, if we equalize freight in the case of welded chain with other producing points the customer would pay less in many instances than he does now on an f.o.b. Pittsburgh basis. But the probabilities are if we were to follow that procedure, we would have to take into consideration our logical market and the cost from the various equalizing points so that we might have to increase our product, because, as I said before, the larger tonnage is shipped to a point where we have to allow freight, and the sum and substance of it is, as I see it, that you would probably have to change you selling price (1491). 2642

"Q. As far as the customer is concerned, then, it wouldn't make much difference to him what basing point system of selling you happened to use? You'd just change the price to give him the same price as he had always been getting? Is that true? A. Well, it would seem to me—we haven't checked into that, as I said before. We haven't thought it was necessary or advisable to change it. But it would seem to me logical that you would probably have to change your price to take into consideration the extra freight that you would have to assume" (1491, 1492).

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Cross-examination by Mr. Steinhauer.

We use the Pittsburgh-plus system on iron chain. I would say that we have probably been doing that for 20 years, because after we moved our plant to Braddock, after we discontinued our Columbus plant, and of course our iron mills, we then moved our iron producing equipment to Braddock and then purchased the iron from Pittsburgh

manufacturers, and then we put it on f.o.b. Pittsburgh basis. Before that it was f.o.b. Columbus, Ohio, where we had the iron mill and the chain plant (1492).

"Mr. Kittelle: I don't want to interrupt, but just to clear it up, was that stud link anchor chain or all types of iron chain?

"The Witness: All types of iron chain" (1492).

Cross-examination by Mr. Steinhauer resumed.

As to whether we discussed these selling methods with consumers, as I say, the very way I look at it is this, if you
2645 have been doing business as we had with companies from the time I entered the employ of the Standard Chain Company, which was in 1901, up until the present time, and there wasn't any complaint from them as to the method of selling, I question the advisability of starting anything. In other words, I think you'd just stir up something from my own standpoint. I am considering the customer, because I believe candidly, that if the customer, the consumer, felt that he wasn't being treated right, he would come to us and do it. They have done it on other matters (1493).

They have done it in the steel case, but so far as we are concerned, it has never been brought to our attention that it wasn't satisfactory (1493).

As to the number of producing centers of welded chain,
2646 York, Pennsylvania is the largest producing center where there are three plants at the present time. It's not necessary to name them; you know them. There's another plant at Trenton, New Jersey, which is now owned and operated by the Cleveland Chain and Manufacturing Company, manufacturing primarily fire-welded iron chain. There is another chain plant at Tonawanda, New York. Cleveland, Ohio is a large producing center. Hammond, Indiana; Winona, Minnesota; Chicago, Illinois; St. Louis; Columbus, Ohio;

and Seattle, Washington and Portland, Oregon. San Francisco, certain types (1493, 1494).

In Portland it's f.o.b. Pittsburgh to Portland, Oregon. None of them have complained. We haven't a factory in Portland, Oregon. I am describing all the plants. What I said here does not apply to our plants. Let me add this, that the only plants of the American Chain Company, manufacturing plants, are located at York, Pennsylvania and Braddock, Pennsylvania. I don't know whether these other plans, in Portland and around, charge Pittsburgh-plus or not. I assume they would and do. The Seattle Chain Company is a subsidiary of the Cleveland Chain and Manufacturing Company, Cleveland (1494, 1495).

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I testified that the amount of freight absorbed amounted to more than the phantom freight in our plants. I wouldn't say that it applied to the entire country because I don't know what they produce (1495).

"Q. I'm talking about the welded plants. A. Well, I mean—my statement applies only to American Chain Company's plant at York, Pennsylvania" (1495).

The only chain that we ship from our Braddock, Pennsylvania plant, which is in the Pittsburgh area just about 12 miles from downtown Pittsburgh, is iron chain, the larger sizes of fire-welded steel chain, stud link chain, boomchain, wrecking chain, forgings, and sling chains, of course. That's practically all we ship out of the Braddock plant. It's not a large producer as compared with the electric welding plants. In other words, as the electric welding progressed, 2649
the fire welding went out, except in the larger sizes and iron, which can not be made electrically welded. About 15 per cent of the total production of the American in welded chain is produced at Pittsburgh or Braddock (1495, 1496).

Now, wait a minute—I'll make that about ten per cent tonnagewise. I think that would be better on a tonnage basis (1496).

2650 *Frederick S. Duncan—For Petitioners—Direct.*

FREDERICK S. DUNCAN, called as a witness for the petitioners, testified as follows on October 3, 1947:

My address is Englewood, New Jersey. I am a lawyer. My office as a lawyer is 230 Park Avenue, New York City. I am a member of the bar of the Supreme Court of the State of New York and of the District Court and the Circuit Court of Appeals in the Southern District for New York, the Second Circuit, of the Supreme Court of the United States, and of District Courts pretty nearly all throughout the United States (1497).

I am an independent practicing attorney. I specialize in patents and trademarks, but I have a general practice
2651 also. As to my connection with the American Chain and Cable Company, I have no special title, but I think they speak of me as chief counsel and as their patent counsel. I have represented them since 1907 as their counsel. I have been connected with them intimately since 1905. As to the manner in which I first came in contact with them, at the request of Mr. Henry Edmunds, an officer and director of the Parsons Non-Skid Company of London, I brought suit against the Weed Chain Tire Grip Company (which was then a partnership consisting of Walter B. Lasher and Frederick D. Baker, both of Bridgeport, Connecticut) for infringement of a Parsons patent on tire chains that had been taken out in this country by the Parsons Company (1497, 1498).

2652 That litigation was commenced in July of 1905 and in December 1905 a settlement was made by which it was agreed that an exclusive license under that patent should be given by the Parsons Company to the Weed Chain Tire Grip Company which was formed in December 1905, a New York corporation with a capital stock of $10,000. The active managerial heads of this corporation, the Weed Chain Tire Grip Company were Mr. Lasher and Mr. Baker, and a little later Mr. William T. Morris, and shortly after that

a Mr. William M. Wheeler. Mr. Morris ultimately became president of the American Chain and Cable Company. He is no longer living. Mr. Baker died a good many years ago. Mr. W. M. Wheeler died a good many years ago. Mr. Lasher is living but is in poor health. He is not now actively connected with the practical affairs of the company (1498, 1499).

During this early period in 1905 or thereabouts and from then on, I had opportunity to study the marketing practices of the Weed Chain Tire Grip Company. I made such a study because of the program that had been arranged between Mr. Edmunds and Mr. Lasher and Mr. Baker in my office, on the basis of which the exclusive license was 2654
given. Mr. Edmunds told me in the presence of these other gentlemen that he had declined offers for an exclusive license by the Pope Company at Hartford at $1.00 a pair royalty, and from the Hartford-Truffault Company, to whom I had given him a letter of introduction before, 50 cents a pair. He was going to grant an exclusive license to the Weed Company at ten cents a pair because of the program which they had laid out and agreed to for the marketing of the Weed grips (1499, 1500).

He stated that these two men and Mr. Morris, who was then the foreman or the superintendent at the little factory they had at 28 Moore Sreet, had a vision, which they confirmed at the conference in my office, of making their tire chains of such good quality and so cheap and of marketing them on such basis that in a short time every automobile 2655
in the United States would have to have a pair of Weed chain tire grips on it (1500).

He said "We'll make more money working with this concern on that basis at ten cents royalty than we will with the Pope Company at $1.00 or the Hartford-Trauffault Company at 50 cents" (1500).

There was a discussion of how they proposed to get this national distribution. They were going to distribute en-

tirely through manufacturers' representatives or jobbers in the automotive trade. They were going to make national appeals in the trade papers and in general magazines. And they were going to carry on a national campaign of distribution (1500).

As to what was said, if anything, about the method of selling of these chains, they were to be sold in accordance with the practice that was then prevalent in the automobile accessory business—jobbers, wholesalers and factory representatives—namely, on an f.o.b. New York basis, with freight allowed or prepaid. The Weed Chain Tire Grip Company was going to manufacture these chains at 28
2657 Moore Street in the Battery or near the Battery, New York City. A plant was then in operation, and it continued in operation there I think until about 1912 when it was removed to Bridgeport (1500, 1501).

As to whether they bought, or manufactured, component parts of the chain, Mr. Lasher was a salesman of the Bridgeport Chain Company, and they bought the side chain, the weldless chain they used for the side chain, then, from Bridgeport. And they also bought chain from abroad. And they bought the cross chains from other sources, from the Standard Chain Company, I think, right from the beginning, except what they got from abroad—some German chain (1501).

The reasons given for adopting this particular method of selling f.o.b. factory with full freight allowed at that
2658 time were because they wanted a universal price, a uniform price throughout the country, so that in the far districts the jobbers could get the goods at a uniform price, could put them in their catalogs at a uniform price, and distribute them to the consumers wherever they needed them throughout the country at the same price (1501, 1502).

They said that that was the way to popularize a new article, and one against which there was some little prejudice

on the part of automobile users for fear that it would injure the tires and injure the roads (1502).

As to the nature of my work for the Weed Chain Tire Grip Company when I came to represent them in about 1907, during the intervening period my particular job was to watch the development of the Weed Company, see to what extent they were carrying out the program, and to collect the royalties and transmit them to the Parsons Company. That I continued to do until about 1916 when the American Chain Company, then formed, took over by purchase from the Parsons Company the balance of the Parsons patents (1502).

And that continued until about 1907 when a number of 2660
other companies began, or individuals, commenced making and marketing tire chains that copied the general construction, mode of operation of the Weed grip (1502, 1503).

> "Mr. Steinhauer: You say that was 1907?
>
> "The Witness: 1907. I was requested to appear in the first of those suits on behalf of the Parsons Company, which I did, and shortly thereafter I was requested to take charge of the litigation for the Weed Company" (1503).

Direct examination by Mr. Kittelle resumed.

In preparation and during the conduct of those suits, 2661
which continued over a period of ten years approximately, Mr. Morris and myself traveled from one end of the country to the other. We had, I think altogether, over a hundred suits pending at one time. We used to travel, visiting different courts and incidentally stop and see jobbers, dealers and infringers and others, so that I became well acquainted during the years from 1907 to 1910 with many of the leading jobbers throughout the country (1503).

2662 *Frederick S. Duncan—For Petitioners—Direct.*

I don't think there was much discussion with these jobbers as to the method of selling that was being used on these tire chains—f.o.b. mill with the full freight allowed—because it was the accepted practice that they followed in purchasing practically all of their automobile accessories. It was their regular practice, which I came to know at that time in that connection, and it fitted right into their regular procedure. These jobbers never complained to us about this method of selling—that they didn't like it. On the contrary, it fitted in. So far as any remarks that were made, it was all in approval of the practice followed by the Weed Company and of the treatment that the Weed
2663 Company gave the jobbers and the dealers and the customers, particularly because of the uniform price that was involved in that practice (1503, 1504).

As to the extent of this infringement, it extended all over the country from one end to the other. Every kind and type of infringer from individual blacksmiths, garages, fleet owners, jobbers who had their tire chains made for them by someone, and some chain companies (1504).

As to the action we took with regard to that, we commenced—we gave notices through the trade papers and by direct letter to all the infringers that we knew of, and in many cases infringers stopped. In many cases they did not stop. And, over that period of years I suppose we brought actually over a hundred suits (1504).

There were, according to the statement made by the
2664 court of appeals, in one of the last cases that was tried along about 1916, some 40 suits that had been passed on by the courts, 24 opinions written and seven in courts of appeals. We finally prevailed (1505).

As to when all infringement stopped, all open infringements stopped, I should say, by 1914 or 1915. When I say "open" infringement I think there were some contributory infringements that went on on the quiet with the

cross chains that were being sold for repair purposes or replacement purposes through the trade (1505).

There was advertising done on these tire chains rather extensively at that time. As to the nature of that early advertising back in 1907 and on up to 1914, about ten years ago I destroyed many files that contained copies of advertisements, of circulars, during those early days prior to 1910. The practice was from 1906 to put the tire chains in bags that had the price, the customer's price, printed in large figures on the bags, and to put inside of the bag a yellow and red instruction sheet upon which was always printed the retail price of all sizes that were then made (1505, 1506).

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I can identify Respondent's Exhibit 19 for Identification. It is one of the instruction sheets that was put in the bags of the Weed grips with the prices in effect September 1, 1910. During the previous four years practically identical instruction sheets and price lists—except that the prices may have differed, I don't know—were put in every bag (1506, 1507).

Shortly after the commencement of the litigation under the Parsons patent, sometime I think about the end of 1908, when the infringement was so widespread and the prices offered for the very poor quality tire chains of the infringers were so low, the Weed Company put out a competing grip known as the Rid-o-Skid tire chain, which they sold at a lower price (1507).

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The general construction was the same, but the quality was different, and the number of cross chains was less, and the prices were very much less. This circular that you have shown me [Respondents' Exhibit 14] was apparently issued in 1911, although I am not sure about that date, but similar circulars were gotten out as early as 1908 or 1909 (1508).

And I might say that on and off in times of intense competition on the part of the infringers the Rid-o-Skid was

sold regularly. And later on, to my own knowledge, during 1920 up to some time in 1930, the Rid-o-Skid grip was revived and sold with similar notices at lower prices than the regular Weed chains (1508).

I can identify Respondent's Exhibit 20. I can't tell you the date of this. It is a price list of the Weed chain tire grips for high wheeled vehicles. It shows the old buggy type of automobile, the horseless carriage. And it must have been a very early date. I should say probably in 1906. Speaking of "The Horseless Carriage," they advertised extensively during 1906 and succeeding years in "Horseless Age" (1508, 1509).

2669 At that time we also advertised in the "Motor World" and in country newspapers throughout the country, in regular newspapers occasionally throughout the country, and especially at times of a storm, and in general magazines of general circulation (1509).

Later on, Collier's and Saturday Evening Post, and then later Literary Digest and all sorts and types of magazines. I might say that we got out all kinds of showcards for garages, for dealers, and resorted to very, very active and interesting methods of advertising going about different cities with trucks, and we made tests which were published in technical journals and otherwise, to keep the public informed as to what the Weed grip would do in giving traction and preventing skidding (1509).

Respondent's Exhibit 21 is another very early circular
2670 that we got out for different dealers and with room to put in their names and distribute. Weed Chain Tire Grip Company made up a large quantity of advertising matter that was distributed throughout the country for the use of the jobbers and our sales representatives. I have no independent recollection of the date of this circular, but it was gotten out shortly after the Glidden Tour up Mt. Washington in 1906, and I should assume that it was either late in 1906 or early in 1907 (1509, 1510).

We had an advertising manager or department of our own that cooperated with a firm of national adv tisers, and the advertising was extensive from the beginning and has continued so up to the present time (1510).

I have had occasion to inform myself as to the expenditures of the Weed Chain Tire Grip Company and its successor, the American Chain Company, for advertising over a particular period. In 1930 in connection with an action which was brought against the Carr Chain Works, Inc., by the American Chain Company, which was defended in part by the Cleveland Chain and Manufacturing Company and by the Hodell Company, I had occasion to study the records in regard to the advertising expense of the 2672
American Chain for the entire period from 1916 when the American Chain Company merged with the Weed Chain Tire Grip Company up to 1930. It was $4,800,000 up to that time (1510, 1511).

I had occasion to examine into the research expenditures of the American Chain and Cable Company or its predecessors, in connection with this same litigation, and during five years just previous to 1930, the research expenditures had been, according to the books of the company, about $225,000. Since then I have been in frequent contact with the research department, and I know their expenditures are much greater now (1511, 1512).

* * * * * *

Some of the various infringers I spoke about are present 2673
respondents in this action. The Cleveland Chain and Manufacturing Company was an early infringer and long-continued. We had a long fight with them and a persistent one. The McKinnon Company, one of the predecessors of the Columbus-McKinnon Company, was another infringer. And the International Chain Company, or its predecessor, the George J. Campbell Chain Company, was another (1513).

I think that the Weed Chain Tire Grip Company had its manufacturing operations in New York City until 1912 and they then went to Bridgeport. As counsel for the American Chain and Cable Company I have had to make a study of the inventiveness of competitors of that company as disclosed by records of the Patent Office and so forth. We have been sued by some of our competitors. We have watched their patents. It is part of my job to examine the patents in the chain line—particularly the chain grip and the emergency unit line as they come out. And up to the time of the late war, I think we kept a complete file of those patents (1513, 1514).

2675 • • • • • •

The American Chain and Cable Company has had litigation with competitors over competitive matters since the patents expired on the tire chain in 1921. We have had several litigations in respect to unfair competition, trademark infringement, and we have been sued by some of our competitors and we have had Patent Office litigation. The unfair competition actions were for copying our style of dress of tire chains and bags they are put in, and generally what we call in the trademark law as "passing off" (1514, 1515).

As to the present respondents in that suit, in this Carr suit, the Cleveland Company and the Hodell Company took part in the defense of the suit, and they were doing the
2676 same thing that the Carr Chain Company was, and an injunction was granted as against Carr which we have assumed from the legal standpoint, was applicable to those who were privies to the defense of that suit (1515).

We also had some litigation with Mr. Campbell, the George J. Campbell Company, on similar lines, a suit in Delaware against the Union Auto Store who were handling Mr. Campbell's products then, and copying our style of dress and so forth. I think that was after the expiration

of the patent. And a suit which was either brought or prepared for bringing in Philadelphia against Mr. Campbell. Mr. Campbell was one of the infringers of the tire chain patents. Well, I don't think they had started at that time. No, I don't think the International Company had started before the expiration of the first patent. I'd like to change that answer. But afterwards they started in with copying of the style of dress and we brought this action against them (1515, 1516).

As to whether or not Mr. Campbell as an individual was infringing, at that time I don't think the International Company had been formed, and my recollection is that he was carrying on his individual business under the name of the 2678
George J. Campbell Company, Inc., but it was his individual business. I wouldn't be sure (1516).

* * * * * *

HENRY ST. PIERRE, called as a witness for the petitioners, testified as follows on November 5, 1947:

Direct examination by Mr. Kittelle.

I am connected with St. Pierre Chain Corporation, Worcester, Massachusetts of which I am president and treasurer. The company was incorporated in 1923. There was a predecessor company. I operated myself with my brother 2679
from 1920 on. I owned it. My brother worked for me. I have been president and treasurer of the corporation since it was formed. The company today makes tire chains, anchor chains, all sorts of drop forgings, aircraft forgings, gun forgings, automotive forgings, and also pitching horseshoes and several different types of tools (1524, 1525).

When I started the company as an unincorporated company back in 1920 we made just one tire chain that was com-

posed of a lug instead of a cross chain. It was made to pull out of bad places where there were very muddy roads. We made it before the Weed patent expired. The lug chain that we made then did not infringe on the patent of American Chain and Cable Company nor did they claim that it did (1525).

Today we make all types of tire chains—all types of tire chains for automobiles. We make very few now of that lug type that we started making in 1920. We make some occasionally, but very, very few because today the roads are so good that they don't use that type much any more. We make what has been called here the standard unpatented
2681 tire chain. We are a licensee under American Chain and Cable Company's reinforced tire chain patent. We do not manufacture that type of tire chain. We buy the parts and manufacture the rest of the chain (1525, 1526).

> "Trial Examiner Ballinger: You manufacture what?
> "The Witness: We buy just the cross chain from American. We manufacture the side chain and the hooks and fasteners that go with it, and assemble it, and we harden the cross chain ourselves" (1526).

Direct examination by Mr. Kittelle resumed.

With respect to the unpatented regular tire chain we manufacture all of that, but occasionally we buy parts when
2682 we are short and we haven't got the capacity. We started making the unpatented regular tire chain just as soon as the Weed patent expired in 1921 (1526, 1527).

As to the comparison of our price for our lug type tire chain, when we were making that, with the price of American Chain and Cable Company's Weed brand, we got hold of an old American Chain price list somewhere and figured our prices quite considerably higher than American's on our lug—a heavier chain (1527, 1530).

When we started making the same type of tire chain that American did, after their patent expired in 1921, that is, the regular unpatented tire chain, as to the comparison of our prices with those of American, we borrowed a circular and based our prices on Weed's. We made our prices exactly the same as Weed's. We copied every price from their sheet (1530).

We priced it higher than American only a few times by mistake. I noticed that maybe one or two times we had it fifty cents higher in a few sets. We made an error in the case of a few sets, but we never could sell it at the higher price. The jobber would always return the invoice and say "Weed's price is so-and-so and we won't give you any 2684
more." They just deducted it, and we couldn't get any more than Weed's prices. The jobber would deduct it. If we billed a set at fifty cents higher than Weed's price, the jobber would compare our invoice with Weed's price and send us a check for the amount shown in Weed's price list, because he figured that Weed's price list was standard, and in sending us his check he would say "That is all you are going to get" (1530, 1531).

That occurred frequently the year we made the mistake. So far as I can remember we made the mistake only in one year. Maybe it was two years, but I know we did it in one year. We have had several cases where we billed the customer different from the list. Maybe the girl in the billing department made a mistake, but they always found it, and
they would always deduct (1531). 2685

I testified that in addition to tire chains we also make anchor chain (1532).

"Mr. Steinhauer: Is that welded or weldless?

"The Witness: It is a welded and forged combination. It is forged and welded also" (1532).

Direct examination by Mr. Kittelle resumed.

That is what we refer to here as the stud link anchor chain, a heavy product with a bar across the middle of the link. It runs from three-quarters, five hundred pounds a shot—that's ninety feet—and it runs up to three and one-half, which is about twelve thousand pounds per shot (1532).

* * * * * *

As to how we sell stud link anchor chain, we made it only for the Navy. We got the business on a bid basis, f.o.b. Worcester, Massachusetts. We bid direct to the Navy
2687 and quoted the price f.o.b. Worcester, Massachusetts. We do not make any weldless chain (1533).

"Trial Examiner Ballinger: Was Worcester, Massachusetts the point of delivery, or was that just the location of the plant?

"The Witness: Worcester, Massachusetts is the location of the plant" (1533).

Direct examination by Mr. Kittelle resumed.

That is where our plant is located, the only plant we have (1533, 1534).

"Trial Examiner Ballinger: It was f.o.b. factory
2688 then, is that correct?

"The Witness: Yes, sir" (1534).

Direct examination by Mr. Kittelle resumed.

"Q. When you sold f.o.b. Worcester on the stud link anchor chain, did you give the Navy or any of the buyers any freight allowance? A. No, sir.

"Q. Straight f.o.b. plant? A. No, sir. We would add it in the plant. This was a new job with us, and it was figured

on a cost basis. If we had given the freight we would have had to add it to the cost, which we didn't want to do" (1534).

When we started to make and sell unpatented regular tire chains back in 1921 we sold them f.o.b. plant, and we had to change in order to meet competition. We started off with the idea that we could sell f.o.b. the plant, but we couldn't go through with it because every jobber we sold to would say, "Well, what's the freight allowance?" (1534).

We made that change in 1921 or 1922. We just copied Weed's method of selling. There was nothing else we could do. I mean American Chain and Cable. We had to copy their policy. We were competing with them. It was 2690
sold then f.o.b. Worcester, freight allowed on 24 or 25 sets—whatever it happened to be at the time. I think it was 24 sets, if I remember correctly. If the buyer bought 24 or more sets we allowed the freight. He paid the freight, and we deducted it from the invoice. He always paid the freight, but when we billed him we allowed the freight, and it was deducted from the invoice. That gave him the same delivered price anywhere in the United States (1535).

If the buyer bought less than 24 pairs, we sold them f.o.b. Worcester, Massachusetts, f.o.b. the factory. He paid the freight, but we did not deduct it. I think that quantity limitation of 24 pairs has remained the same at all times. I haven't checked on it, but I think it is approximately the same as far as our company is concerned. We have not 2691
made any change in that delivered price method of selling from that time up to the present time on tire chains. It seems to be followed generally by everybody, and it is working very well (1536, 1537).

When we adopted that method of selling we did not have any discussion with American Chain and Cable Company or any of our competitors about it. At that time we didn't know them at all as far as our sales were concerned. We

have never had any discussions with any competitors about this method of selling—whether it should be continued or changed to something else (1537).

It seemed to be satisfactory. Everybody seemed to be satisfied. We never talked about that. I never had any correspondence with competitors on that subject. I don't think that I ever overheard any conversation among competitors about that method of selling. I can't remember any. It seemed to be accepted by everybody. That method was accepted by everybody as far as I know. That method has proved satisfactory to our business. It is because it gives every jobber a fair price. Take, for instance, if we
2693 are selling a jobber in Portland and we allow the freight to Portland. He gets his goods delivered at a certain price. Then if we have a jobber up in Houlton, Maine, it is delivered to him at the same price so he can compete with the jobber in Portland (1537, 1538).

Examination by Trial Examiner Ballinger.

I considered this policy of our company a sound one. I do not consider it to be speculative because we are selling the customer and we have to satisfy the customer. We had to meet conditions, and we have to satisfy our customers. That is the principal thing with us. And our Portland man is satisfied with the system too, because it helps him. Otherwise they wouldn't know what they are doing. The
2694 Portland man could go up into Houlton—he could go up into that territory and deliver chains cheaper than the other fellow and it wouldn't do him any good because the other fellow would be disturbed and you wouldn't know where you were. In other words, you would have a lot of headaches. We like to have things simple and plain and understandable to everybody, so that everybody can live and everybody is treated in a fair way (1539, 1540).

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Direct examination by Mr. Kittelle resumed.

When I say Portland, I mean Portland, Maine (1540).

"Mr. Steinhauer: How about Portland, Oregon? Do you ship out there?

"The Witness: When we have enough business in the East, we don't like to do it. But when we do ship to the West Coast we ship by water, and there isn't too great a difference then. There is some, but not an awful lot, when we ship by water. When we ship in the East, we ship by railroad.

"Mr. Steinhauer: It is not my intention to cross-examine the witness at this time. I just want to object 2696
to this line of testimony. As I say, it is purely speculative, and I don't think we should go into it.

"The Witness: It is not speculative with us. We have to live with our customers" (1540, 1541).

Direct examination by Mr. Kittelle resumed.

I meant Portland, Maine. We do sell a little on the Pacific Coast, but not much and any goods sold on the Pacific Coast are shipped by water only. Outside of these shipments to the Pacific Coast, a lot of our tire chains are sold mostly in New England; some in New York State, New Jersey and Pennsylvania. And then our tools are sold all over the United States. We do a little export—not much. Our tire chains are sold mostly in New England and the 2697
eastern part of the United States (1541).

As to how our business would be affected if everybody in this industry was required to sell tire chains f.o.b. mill without any freight equalization or any freight allowance in order to get in the other fellow's territory, I think we have a big advantage in New England, but we would be out in other parts of the country. Right now I would just as

soon we'd have New England, if we could, but we have a lot of ideas of expanding, and therefore I would rather than [sic.] on the freight allowance basis for our company —I think one reason is on account of the weather. The weather we get in New England is very good for chains, but sometimes you get weather further west that you don't get in New England. It would be nice to ship out of New England because it is more diversified and it helps our planning and helps our sales a lot, because if we don't get any snow we don't get much business (1542, 1543).

Another thing is if it is divided up and other people come in the territory, then if we do get a big storm in New Eng-
2699 land we wouldn't be able to take care of the business. And in that way we can, because the other companies help out, and then we help out further away from the plant. Now, our reason for not going further is because we never had the capacity and the volume to go further than we are (1543).

We have a tire chain product for putting on tire chains. We have a new device that can put on a chain in a few minutes and take it off in half a minute. And that is why we would like to have more territory and be able to ship f.o.b. Worcester, freight allowed because that would give us a chance to expand on that new item (1543).

This device can enable you to put the tire chain on in a few minutes and remove it in half a minute without either losing your temper, jacking the car or getting dirty. It
2700 is a patented product. As yet we do not license anybody else to make it (1543, 1544).

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We rented our plant at Worcester from Rogers Forging Company at first, and then they sold the plant to us. We have since added buildings and enlarged—bought extra land—so we have developed it from then on. In 1921, when we first started as an unincorporated company, we just

had a small building in the Rogers Forging Company plant —just a very small building. We sometimes had two or three employees and sometimes a dozen. Our first year's sales were $11,000. That is back in 1923 when we operated. We were very small. Today we have twenty-two acres, and I think we have 60,000 square feet of floor space. We run anywhere from a couple of hundred up to five hundred employees. During the war we had as many as seven hundred and fifty at one time (1551).

As to why we picked Worcester as a plant location, I lived in Vermont at the time, and Worcester was the nearest industrial city to my home in Vermont. That is why I came there. I figured that no matter what I had to make I could get it made in Worcester. We get most of our wire 2702
from American Steel & Wire in Worcester, but some also from Bethlehem at Sparrows Point, and forgings from practically all the mills. The steel that we use in making tire chains we get from Worcester—mostly all from Worcester. Worcester is a basing point for wire only. The American Steel & Wire Company plant is located there (1552).

* * * * * *

We do a little advertising of our tire chains, but not very much. Very, very little. As to the media we use, we have circulars, we did advertise in American Chain—in their advertisements. We paid them a royalty and they used part of the money to advertise, as far as I know. Those advertisements went into consumer publications, like the 2703
Saturday Evening Post, and publications of that sort. That has reference to bar chain only (1553).

As to how that advertising program worked, they all advertise the same, telling you how good the bar chain is, and they would start off with one firm's name at the top of the list and then they would rotate the names on the list so that we would be at the top one time and then we would be in the middle and then at the bottom. That's

2704 *Henry St. Pierre—For Petitioners—Direct.*

the way it worked. We always had an equal chance. The funds to put these advertisements in these publications came from the royalties paid to American. We paid a royalty, and I think a certain percentage of the royalty paid was used for advertising purposes (1553, 1554).

We did make so-called substandard or second grade tire chains. Just before the war we always had the substandard. As to the reason we did, we copied Weed's policy and where they had a substandard, we did. The price of the substandard was much lower than the price of the regular. The substandard wasn't finished chain. The chains were lighter and spaced further apart. It was a low-priced chain
2705 (1554).

* * * * * *

I testified that we follow the prices of the American Chain and Cable Company. The reason we do that is there is no other way to do it. We tried at the time the federal tax came in to do differently than American Chain and Cable or the rest of the concerns, but as soon as they found the 2½ per cent tax which the other fellow didn't show on the invoice, they would just deduct it. Sometimes we can get it, but most of the time we can't. The last time we had a federal tax of 2½ per cent, everybody in the industry went along and allowed that tax to the customer. We didn't. Everybody absorbed it. We didn't. We charged the customer the tax, but he would almost invariably deduct it. We would write letters about it and once in a while
2706 we would get one to pay it; most of the time we did not. It just made the customers dissatisfied and we had to give it up as a bad thing. We could not sell for more than the American Chain and Cable Company (1559, 1560).

We could not sell at a higher price. We could sell at a lower price. But we wouldn't make any money that way. The margin is too close. We don't create the stuff out of the air. We have to build it. It costs so much, and with the competition that we have there is no margin of profit

on chains. There is a good margin on volume, but not on small deliveries (1560).

"Mr. Steinhauer: A good margin on what?

"The Witness: There is no margin of profit on this. You have to depend on volume for your profit.

"Mr. Steinhauer: I see.

"The Witness: So if you start cutting price you just don't make any money and you don't stay in business. It's hard enough as it is" (1560).

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Cross-examination by Mr. Steinhauer.

* * * * * * 2708

As to the pricing of our tire chains from the prices gotten out by Weed before they changed the name to American, it was always American chain, but there was a Weed chain they sold, and we always called it Weed, and we got the prices from some jobber.

"Q. And did you take their prices in one year? A. We just followed it closely. Whenever a jobber friend of ours got a list, we would get a copy of it" (1575).

We did not also get a copy from American directly at that time. We didn't know them at all. That was '21 when we first started. I don't know when we became acquainted with them. We got acquainted, I think, during the NRA days, and they started sending—I think they sent a jobbers list out. We buy a lot of material from them, so we get 2709
their list when they publish it, along with the rest. We copied their list before the NRA days, but we didn't get it from them. Now we get it from them, which makes it easier. We never discussed the freight allowed system or basing point system on tire chains with anybody at all because it worked satisfactorily. We didn't know of anything better. We didn't talk it over with anybody but our jobbers and our salesmen. It was established. It was

working fine, so why disturb it. They didn't convince us that it was a good system. We convinced ourselves (1575, 1576).

"Q. You must have known what was going on, how it was working out. A. We are just ordinary people. We have to compete, and the customers we went to with freight FOB Worcester said, 'We won't buy your chains unless you do the same as American and allow the freight,' so we allowed it. We didn't discuss anything. We had to meet it, that is all" (1576, 1577).

We sell our anchor chain f.o.b. factory. We do not do that because of the specifications. That is a chain we never made, and we went by a cost basis. We do the same thing
2711 on forgings. If you have a forging you want made, we make a special die and sell f.o.b. the factory, because we are the only people making it. Why charge the freight? We have to add it in, and we don't give a two per cent discount on the forging because if you want a price, we have to add it to the cost, and it is simpler to go f.o.b. factory and no discount (1577).

"Q. You would not have to do that anyway because you wouldn't have those specifications in any price list of any company. A. No, we figure from a cost-plus a little profit, and if we have to allow the freight, we have to add the freight. This way we don't, but on tire chains it is a different proposition. We had to meet competition, and we had to—The Navy doesn't sell anchor chain, they use it.
2712 When we sell Kaiser-Frazer or anyone forgings, they come in for a special price. We make the die, figure our costs, add the costs, plus a little profit we hope to get, and then we bill them 30 days f.o.b. the plant (1577).

"Q. And there are no price lists contained in the specifications? A. If we have a competitor making the same thing and they send out and get a die made and compete or sell it for a dollar, and the fellow comes along and says, 'We are buying this for a dollar and you are charging $1.10,'

we have to bring it down and sometimes equalize the freight" (1578).

As to specifications for a special order, these specials are not in any price list so the natural way is to sell that f.o.b. our plant. We sell a little, not very much, as far as the Pacific Coast at times (1578).

As to how much freight it takes on our chain out there, water freight is considerably lower than railroad freight, but I don't know just how much. I could find that out. We ship to California. We ship very little to Arizona. I don't know of any. We may have shipped. Years ago we shipped chain to Mexico and that was export. I don't know just what we did on that. I think on export we shipped 2714
to New York and paid the freight to New York City (1578, 1579).

We never have shipped chains to New Mexico because we are too far. Maybe we did ship to New Mexico on the Shirley, Olcott. We ship to Colorado. We have shipped to Colorado. The freight rate is quite high on chains from our plant to Colorado. I don't know what it is, but I could find out. I have no idea what the proportion of that would be to the price of the chain percentagewise. It would be just guessing and wouldn't do any good (1579).

I do not know whether frequent discussions are had at chain institute meetings about price cutting on the part of the different members. I have been to the meetings (1579, 1580).

"Q. You don't remember hearing any discussion of price 2715
cutting? A. You mean past transactions?

"Q. I don't care what transactions they are. A. I never did. I never paid too much attention to what they were saying anyway.

"Q. You can't say there wasn't any price discussion? A. I will tell you, we were off by ourselves and didn't enter into those things at all.

"Q. You certainly were interested to see that others didn't cut prices. A. If a group was talking together and it was none of my business, I didn't butt in.

"Q. Did you put your fingers to your ears so you didn't hear any of it? A. No, I didn't hear a thing.

"Trial Examiner Ballinger: The question is, did you put your fingers to your ears.

"The Witness: No, sir" (1580).

Cross-examination by Mr. Steinhauer resumed.

2717 As to accounting for the fact that I didn't hear about those conversations or whether there were any, maybe they didn't discuss it (1581).

"Q. So that if you had different prices on the specifications, you couldn't use this plan of universal pricing, could you?

* * * * * *

"Mr. Kittelle: Are you talking about anchor chain now?

"Mr. Steinhauer: No, just regular chain; talking about specifications on them.

"The Witness: We had different prices on it.

"*By Mr. Steinhauer.*

2718 "Q. Different prices on your specifications? A. Well, there isn't any price on specifications, as far as I know. We have the specification to build a certain chain by——

"Q. But if you had another specification added to it, or if the chain had special specifications, that is true, that you all had your special prices on those, is it not? A. I can't figure out what you mean by we had different prices on specifications. Where did you start from there?

"Q. Well, I say, if you had different prices on your specified chain, you couldn't use this plan of universal pricing.

A. Well, the specification—The price has nothing to do with that. You wouldn't make a bolt to fit a locomotive.

"Q. If your company had one price on that particular specified chain and another company had another specified price, you couldn't use— A. (Interposing) There are several different specifications in this list" (1581, 1582).

If our company had one price on this particular specification and another company had another price on it, you couldn't help but use this system of universal pricing, because that is what fits the chain. You couldn't put a 600 x 16 on a 750 because the price is different. You have got to make a chain to fit the 750 (1582).

We just don't figure the price. We copy it, because it wouldn't do us any good to figure it. We all have to have the same prices. If we don't have it, they don't buy. We don't get away with that stuff in the industry. We just can't. We can't lift ourselves up by our boot straps, if we tried (1583). 2720

As to having the same prices in all these specifications, we have to have the specification to fit the wheel. If American puts a price of $10.00 on it, we sell at $10.00. If someone else puts a price of nine, we forget American and sell at nine. If it costs $10.00 to build, we still sell it for nine and hope to make enough on something else to keep alive. That is the way it is working out, and I don't know who could change it (1583).

We cannot charge different prices. We can't get away with it. What is the use of charging a price if you don't get paid for it? Would you, a jobber, buy a chain at $10.00 and give us $12.00 for it? If you would you are different and a jobber we might like to sell to (1583). 2721

We can raise and lower our prices, but we keep our chains. We don't sell them. We might get away with it temporarily because there is a shortage, but then we would be crucified after the shortage. We would never get another sale. We have to all have the same prices at all times.

That is the law, the natural law in the industry. It just can't be done any other way. It could be done by selling f.o.b. and going out of business. You couldn't stay in business and do it. If you don't believe it, try it. I will turn over some of these accounts that sometime even take a two percent in 30 days, and try to collect it from them. You will find some you will get, but very few (1584).

* * * * * *

As to whether it is absolutely necessary for us in selling our tire chain to have the same price to the customers as everybody else, we might sell it at one or two cents difference. If we put out a chain at $10.00 and got $10.50,
2723 we wouldn't get too much resistance, although they might deduct it (1585).

It has been the practice to sell on an absolutely uniform basis, that is a price f.o.b. the plant—the customer paying the price and the freight and then having the freight refunded. We have followed that through from the beginning. That is absolutely uniform between all dealers. It seems to be general on most all that type of business that sell the automotive jobber or the electrical jobber. They all seem to be the same (1585, 1586).

Besides tire chains, we have a drop forge plant and make commercial forgings. That is on this Anchor chain, and also on automotive forgings such as connecting rods and things like that, and we make a line of pitching horse-
2724 shoes we sell the jobber. The percentage comparison of our business in those articles and our chain is about 50-50 (1586).

Sometimes the forge plant during the war was away above the chains, but right now the chains are higher than the forgings. Our business has increased a very great deal since we started in chain (1586).

* * * * * *

Examination by Trial Examiner Ballinger.

I attended most of the meetings of the Chain Institute. I missed occasionally, but I tried to get out to them. Sometimes they had meetings every month. Sometimes they skipped a month or two. They just didn't have any set time. As far as I know, during NRA I think we went every month. Never while I was there in the meetings did they discuss changing of prices of chains.

Cross-examination by Mr. Steinhauer resumed.

"Q. You can't say they never discussed changes in prices while you were a member of the chain institute? 2726

"Trial Examiner Ballinger: Are you speaking of meetings at which the witness was present?

"The Witness: I don't know what they did at meeting when I wasn't there.

"*By Mr. Steinhauer.*

"Q. You don't mean to say while you were there they didn't discuss prices? A. I don't know that either.

"Trial Examiner Ballinger: What do you mean by you don't know?

"The Witness: I don't know what the other fellows discussed. 2727

"Trial Examiner Ballinger: Do you mean that you never heard, when you were present at any of those meetings, any discussion as to prices or changing in prices?

"The Witness: No, sir, not at the meetings" (1589).

* * * * * *

2728 *George J. Campbell, Jr.--For Petitioners—Direct.*

GEORGE J. CAMPBELL, JR., called as a witness for the Petitioners, testified as follows on November 5, 1947:

I live at York, Pennsylvania. I am connected with International Chain and Manufacturing Company located at York, Pennsylvania. I am president of that company and have held that position since November, 1941. I have been with the company since 1926. I have been practically everything in the plant, I guess. I started in the shipping room and different departments. I was made manager of the plant—I believe it was in 1932—somewhere around there. I remained in that capacity until I became president (1598, 1599).

2729 My functions before becoming president were about 95 percent production. I might be called on some special job on sales. That's about all (1599).

The plant is located in York. We have only one. George J. Campbell, Sr. was my father. He died in September, 1941. The International Chain and Manufacturing Company was organized as a corporation around 1926. Prior to that the company was in existence under another name. For a while it was called the Victory Chain Company. Before that it was just under the name of George J. Campbell, my father. He owned that company (1600).

The International Chain and Manufacturing Company now makes tire chains, welded chain, and certain types of weldless chain. In 1926 we weren't making any electric
2730 welded chains as we are today. We were making fire welded chain. We started making electric welded chain about 1928. We were making tire chain in 1926. We were making very little weldless chain. Our production on that has increased (1601).

We were not actually manufacturing the tire chains and all the parts of them in 1926 when I came with the company. We bought the cross chain mostly from Europe and case hardened the cross chains and side chains, and assembled them (1601).

We used weldless side chains. Now we use welded side chains. I couldn't tell you when we started that. I believe it was around 1939 or 1940. We now sell our welded chain f.o.b. Pittsburgh. Our company has always been selling welded chain on that basis (1602).

Examination by Trial Examiner Ballinger.

So far as my recollection goes, we have always done it on that basis (1602).

Direct examination by Mr. Kittelle resumed.

We now sell weldless chain f.o.b. nearest factory. We 2732
sell f.o.b. York and equalize freight with these various points—Cleveland, Cincinnati, Bridgeport. Not Holland, Michigan. We don't manufacture that type. We make no furnace chain. We have been selling weldless chain on that basis as long as I know of myself. I don't know whether it went back as far as 1926 or not. All I know is it came out about 1939 or 1940 as far as I can recollect (1603).

We sell tire chains today on a delivered basis, f.o.b. plant with full freight allowed. The quantity limit that has to be bought before we will allow the freight is 150 pounds. That would be about eight pair of passenger car chains. We have not always had that 150 pound quantity. It has been different. I think it was 200 pounds at one time, and we cut it down to 150 (1603, 1604).

2733

I believe that I attended one meeting of the Chain Institute with my father when he was alive. That's all I have any recollection of at any rate. And I couldn't say where that was. Since my father died, as president of the company, I have attended meetings of the Chain Institute (1604).

"Trial Examiner Ballinger: How regularly?

"The Witness: Well, practically every time. I have missed only a few since 1942" (1604).

Direct examination by Mr. Kittelle resumed.

Never before this suit came up did I engage in any discussions with competitors with regard to any of the three methods of pricing we have discussed, that is, Pittsburgh plus on welded chain, freight equalization on weldless or the freight allowed basis on tire chains (1605).

Subsequent to the bringing of the suit my discussions
2735 have been just talking together as to how in the world we could possibly do any different (1605).

"Trial Examiner Ballinger: At the meetings?

"The Witness: No, sir. Never at any meetings.

"Trial Examiner Ballinger: Was there ever any discussion at the meetings?

"The Witness: No. It was just talking to somebody afterwards. That's all" (1605).

Direct examination by Mr. Kittelle resumed.

I mean about this lawsuit. If my company wants to it is free to change from any of these methods to some other method. Any time (1605).

2736 I have never considered changing and selling on any other basis (1606).

I have, since I have been attending Institute meetings engaged in or overheard conversations among competitors about past transactions or price cutting. I have heard conversations of that sort several times—at different times. For example, one time the question came up as to how a company could possibly sell their chains at such ridiculously low prices when there was plenty of business around (1606).

"Q. What company was that? A. The company that was asked the question.

"Q. Do you know the name of the company? A. I don't know who it was. The one they were talking about was ours" (1606).

Tire chains were the ones being discussed. That was bad. We had a price war on at that time. It ran from 1940 until 1942, and we were meeting competition. The nature of the discussion was how in the world we could make any money on that basis (1606, 1607).

Examination by Trial Examiner Ballinger.

I don't remember who was present during those discus- 2738
sions. This was not at a meeting of the Institute. It was just a conversation or discussion among the fellows afterwards (1607).

Direct examination by Mr. Kittelle resumed.

It was at the time of an Institute meeting. It was after one of the meetings. I don't know whether it was at dinner that evening, or something, but anyway, that came up. I have asked people that myself—the same thing. I did not stop the price cutting after that discussion. You see, this was in 1942. In the course of the conversation I brought out that no matter how you felt, we felt just as badly as everybody else, but our prices were out for the season, and 2739
once we put out prices for the season we never change them. They are put out for the season (1607).

I don't know when the OPA came into effect.

By Mr. Steinhauer.

I mean by "out for the season" that once prices are published that takes care of the whole year (1608).

Direct examination by Mr. Kittelle resumed.

These were off list prices, not published prices. Once we put out an off list price to a customer we did not feel that we could change it for the season. Whatever his discount happened to be, that we held to. A lot of them had catalogs and they put those prices in no matter how. It was unfortunate for us we met this competition early in 1942, and then with all the business that came along—the war business started at that time—we were taking a terrific loss on this business we had, but we had to carry through to the following year. We were meeting competi-
2741 tion from Hodell Chain Company at that time (1608).

Examination by Trial Examiner Ballinger.

We put out a catalog of list prices. We also have discounts. They are discounts from the list prices. When we raised our discount that meant that we gave them a better discount. And when we gave that to one of our customers, that continued in effect during the remainder of that year (1609).

Direct examination by Mr. Kittelle resumed.

This special price was in some cases as much as 40 to 45 per cent below our published prices and published dis-
2742 counts. That applied to more than one customer. It was 40 to 45 percent below our published discount—a bigger discount than our published discount by that amount (1610).

Examination by Trial Examiner Ballinger.

When we gave an off the list price to one customer we did not accord that to all other customers (1610).

* * * * * *

Direct examination by Mr. Kittelle resumed.

We had a list price of so many dollars for a pair of tire chains. Then we had a published discount, which, for example would be 50 per cent and 7 per cent, or something like that. As to those customers that we were giving this special price and the discount, as compared to the 50 per cent and the 7 per cent that we published, the worst was 60 per cent, 10 per cent, 10 per cent, and 10 per cent. That's the worst I know of (1612).

If our list price was ten dollars, and we took 60 per cent, 10 per cent, 10 per cent, 10 per cent—and another 10 per cent—four 10 per cents. I cannot make a computation to 2744
show what we would come out with. We would take 60 per cent off the ten dollars first. That gives us 40. If we take 10 per cent off of 40 that gives us 36 (1612, 1613).

"Mr. Steinhauer: And then the next 10 per cent would be 3 6/10 less?

"The Witness: That's right, 3 6/10 less, and on down, until you have taken off the full discount" (1613).

Direct examination by Mr. Kittelle resumed.

Each percentage applies to the net balances remaining after deducting the others (1613).

As to the effect on our business of selling all types of chain that we now manufacture f.o.b. York without any 2745
freight allowance or freight equalization, all our competitors being required to sell f.o.b. their mill in the same manner, in my opinion, being one of three chain companies in the City of York, if we had to sell f.o.b. York, Pennsylvania it would tie us down to a radius of around two hundred miles from our plant, and I think it would be the fastest and surest way of putting us out of business in a short length of time (1613, 1615).

2746 *George J. Campbell, Jr.—For Petitioners—Direct.*

We have a tire chain competitor in Newark, the Pyrene Company. We have Mr. St. Pierre up in Worcester on tire chains; Columbus McKinnon Chain Corporation in Buffalo on tire chains and welded chain; Cleveland and Hodell in Cleveland; and McKay, located in York with ourselves and another plant in Pittsburgh on welded chain, and American, located at York. I am familiar with the demand and the amount of business on chain that exists in that territory, i.e., the territory that we could get into before we ran into the competition of these other plants (1616, 1617).

If everybody sold f.o.b. mill the three companies that have plants at York would by no means have enough busi-
2747 ness in that territory to satisfy their production capacity (1617).

Our company would not have enough business in that limited territory to take care of its production. And I also reiterate again on the other angle, because I know exactly how many machines they have in their plants, and how much business is in that territory, so I do know whether they can take care of it or not (1620).

* * * * * *

As to whether my company advertises its tire chains or any other chains, it does but not too much. We don't go into consumer advertising. We do some national advertising in certain trade magazines. We do not do as much advertising as the American Chain and Cable Company. I
2748 don't know about McKay but we don't do anywhere near as much as American Chain and Cable does (1621).

* * * * * *

Before the beginning of the late war our company sold its unpatented tire chain at a different price than that of American Chain and Cable Company (1625).

During the period of the recent depression in the 1930's our company sold its unpatented tire chain at a price dif

ferent from that of American Chain and Cable Company (1629).

"Mr. Steinhauer: Do I understand this is patented tire chain?

"Mr. Kittelle: Unpatented.

"The Witness: As I said before, it reached the point where we were selling at a price 40 to 45 per cent lower than they were selling for.

"Mr. Steinhauer: What period was this?

"The Witness: The same time" (1629).

Direct examination by Mr. Kittelle resumed. 2750

When I testified before, I was testifying about 1942. You see, 1942 was the end of the season. I mean it was really 1941 to 1942. In other words, the 1942 that I mentioned was around January, and we still had the months of January, February, and March to go. Now, the two worst years we had, as far as the price war was concerned, were 1940 and 1941, I believe (1629, 1630).

Before that, we always sold lower than American Chain and Cable Company because we felt we had to at that time on account of their being in business longer than we. We were really just getting started in the tire chain business. As to whether the advertising of American Chain and Cable Company had anything to do with it, they naturally advertised, and we didn't, and we couldn't go into a job and 2751
get the same price that they were getting. We couldn't get the job (1630).

"Q. Did you during that period publish a different price than they did, or did you do this by off list discounts? A. Yes, sir" (1630).

We always did—from 1921 on—have lower prices than they did, until 1942. The year 1942 was the first time that we were even (1631).

2752 *George J. Campbell, Jr.—For Petitioners—Direct.*

"Mr. Steinhauer: According to you, you never had the same prices as American in all those years. Is that what you maintain?

"The Witness: I'd say 99 per cent of our sales" (1631).

Direct examination by Mr. Kittelle resumed.

99 per cent of our sales were at a much lower price than those of American Chain and Cable Company. We may have had some motor fleet or some special account that we could get the full price from, and then we did (1631).

2753 "Mr. Steinhauer: Have you any documents which will fully prove that—that in 99 per cent of your sales your prices were different from those of American Chain and Cable Company from 1926 to—what? 1941?

"The Witness: 1942. The 1942-1943 season.

"Mr. Steinhauer: Do you have documents to prove that?

"The Witness: I don't know how far back our invoices go, but I don't think they go back that far.

"Mr. Steinhauer: Aren't you aware of the fact that we have your invoices?

"The Witness: That doesn't show the picture at all.

"Mr. Steinhauer: It doesn't?

"The Witness: Ninety-nine per cent of those sales
2754 in there are lower than American Chain.

"Mr. Steinhauer: Not all of them.

"Mr. Kittelle: Don't forget that you picked the invoices that were on the list, and those are the only ones you put in the record. There are a lot more you may have that are off list, and if you made a study of those you would probably find that this all checks out.

"The Witness: We never sold at the same price as American Chain and Cable Company except in the case of a very few accounts" (1631, 1632).

Direct examination by Mr. Kittelle resumed:

As to these differences between our actual selling prices on unpatented tire chains and American's prices, the differential varied from one year to the next, depending upon our competition (1633).

As to the letters in the record which my father apparently wrote to a man by the name of J. Shelton Hardison, Mr. Hardison was a salesman for J. K. Wilson Company of Baltimore, Maryland, who represented us on welded and weldless items in the south. They are manufacturer's representatives. To my knowledge, we are the only chain manufacturer they represent. I think they handled our tire chains a very little bit; I don't know how much, but it was taken away from them. I don't remember what year. I don't remember whether it was '39 or '40, but very, very little tire chains (1633, 1634). 2756

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"Mr. Kittelle: Now, just for the record, since we got into a little argument on these invoices, I would like to point out that Commission's Exhibit No. 1575, which contains the invoices of a number of the respondents for October, 1941, and which contains all of the invoices for the International Chain Company which were put in the record by the Commission as being invoices which were in accordance with the list prices and published prices of these respondents, contains only two invoices of the International Chain and Manufacturing Company for that one month, just two invoices. I would like to show the witness the first of these invoices, which is Invoice No. J-5566, in Commission's Exhibit No. 1575" (1637). 2757

The types of chains that are in there, sold to General Mills, Inc., Farm Service Division, Fair Haven, Vermont are for their own use, for their own truck, and these two pair might be for salesmen's cars. We sold them through the R. K. Carter Company, and we gave them the full list, because R. K. Carter Company go out and sell jobbers themselves. R. K. Carter and Company is a buying organization for jobbers and dealers. In other words, you get their service, and they will buy anything for you (1638).

That shipment was shipped direct to General Mills. There was no discount shown beyond our published discount to General Mills. That was October, 1941. As to
2759 whether or not we gave R. K. Carter Company any extra discount or commission on that, I believe that we used to give them five per cent until the law made it illegal for these buying organizations to get any discount, but I don't know when that law went into effect. But up until that time it was declared illegal we used to pay them five per cent (1638, 1639).

The next voucher, J-5217, went to the same people, General Mills, through R. K. Carter, with the same arrangement and same idea. This one pair each of four kinds of tire chains and 50 pairs of cross chains and 100 pairs of passenger cross chains are not for resale. These are for General Mills' own use (1639).

"Mr. Steinhauer: They took the regular price?

2760 "The Witness: Yes.

"Mr. Kittelle: Now, those are the only two invoices that appear in the record, Mr. Examiner, of the International Chain Company, showing that they sold on list in October 1941, and my associate Mr. Hilder just made a check and said they had some forty-odd other invoices during that month furnished to the attorneys for the Commission, which were all off list, so that will

give some idea of the accuracy of the witness' testimony.

"The Witness: Well, according to that, it would be 99½ now" (1639, 1640).

Direct examination by Mr. Duncan.

Since I first became connected with my father's business or the International company when it was organized, the number of employees engaged in the chain business has increased. When I went in there in 1926 we had a total of anywhere from 8 to 10 people. Today we run anywhere from 375 to 400. Comparing our manufacturing space for chain between 1926 and the present time, it is, I guess, 15 2762
times larger. During the same period the volume of our sales is roughly 22 times larger today (1640).

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Cross-examination by Mr. Steinhauer.

"Q. I would like to ask you again, Mr. Campbell, about this shipment of chains where you equalize freight, isn't the minimum 24 pair among all the respondents? A. No, we don't go on that basis.

"Mr. Kittelle: He didn't say anything about equalizing freight.

"The Witness: You mean on allowing freight?

"Mr. Steinhauer: That is right. 2763

"The Witness: As far as I know, we don't go on that basis. We go on weight" (1645).

Cross-examination by Mr. Steinhauer resumed.

I don't know what others do on that. I think some have 24 and some have 12. We just happened to have 150 pounds. Twenty-four pair would be around 450 pounds.

On any sale less than 150 pounds we don't allow freight. I said that I had heard price cutting discussed at the Institute meetings. I wouldn't know anything about whether during my father's lifetime our company was brought into those price discussions considerably (1645, 1646).

Mr. Merriman has nothing whatsoever to do with our prices. He has, however, consulted us about our price cutting now and then. I imagine he has received complaints from some of our competitors about our price cutting. I have never complained to him about the competition or our competitors cutting prices. I don't know whether my dad
2765 did or not (1646).

When our plant first started up it was just a fire welded shop when I went there in 1926. The sales were very low right at the beginning of the company. I can't give an exact figure. I don't remember exactly on any figures up until 1941, and I can [sic.] give it to you very close. When I say that our plant grew 22 times, I mean in what I feel are the approximate sales of 1926 as against today. We started to sell tire chains in 1921. That was the first year we were allowed to. We have grown 22 times since 1926. I did not testify as to how much business we did in that year. As to how much we did, I think— (1647, 1648).

"Trial Examiner Ballinger: He testified as to the number of employees.

2766 "Mr. Steinhauer: Yes, I know that" (1648).

Cross-examination by Mr. Steinhauer resumed.

I do not know exactly how much we did in '26 (1648).

Examination by Trial Examiner Ballinger.

I could approximate the amount we did in 1926, but do I have to give you those figures? They are all secret. I

have said how many times we have increased our business, so you can figure automatically what we are doing today if you know what we did in 1926 (1648).

LOUIS D. CULL, called as a witness for the petitioners, testified as follows on November 5, 6 and 7, 1947:

Direct examination by Mr. Kittelle.

My address is Glenvalley Road, Brecksville, Ohio, a suburb of Cleveland. I am connected with Cleveland Chain and Manufacturing Company, Bridgeport Chain and Manufacturing Company, Seattle Chain and Manufacturing Company, Woodhouse Chain Works, and Round California Chain Company (1653). 2768

I am Chairman of the Board and Treasurer and General Manager of the Cleveland Chain and Manufacturing Company; President of the Bridgeport Chain; Secretary and Treasurer of the Seattle Chain and Round California Chain; and Secretary and Treasurer of the Woodhouse Chain, I believe it is. I think I am Secretary and Treasurer. I know I am Treasurer and I believe I am Secretary also. It is hard keeping track of all the titles. I think that I have covered them all (1654).

As to whether these companies are affiliated, I would rather say they are associated. We have the same stockholders in most of them, but generally speaking, outside of the Woodhouse Chain Works, the Cleveland Chain and Manufacturing Company owns no stock in any of them, so they couldn't properly be called affiliated, I don't believe. The Cleveland Chain does own all the stock of the Woodhouse Chain Works (1654). 2769

As to when I first came with the Cleveland Chain and Manufacturing Company and what position I then had, in 1907 the Cleveland Chain and Manufacturing Company

was started and incorporated. Mr. L. D. Round was President and I was Secretary and Treasurer. I continued to hold that office of Secretary and Treasurer, or those offices, until Mr. Round died in 1938, when I became Chairman of the Board, and Treasurer. During most of the period I was General Manager as well (1654, 1655).

Prior to 1907 I was connected with David Round and Son. Mr. L. D. Round was the son of David Round and Son and we manufactured chain hoists and stud link chains to some extent, and welded link chains sold locally for the most part. I first came with David Round and Son in 1901. As to my position, I was practically the whole office force and the shipping department. I made boxes, took
2771 up chain makers' time, figured payrolls, made out invoices and generally did the work. David Round and Son made stud link anchor chains (1655).

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David Round and Son also made hoist chain. That is a welded chain that is accurately made to fit into the pockets of a chain wheel to raise and lower as the gearing is turned, and they also made sling chains for foundry use (1656).

* * * * * *

As to the method of selling by David Round and Son of its stud link anchor chain, sling chains and hoist chains from 1901 to 1907, the stud link anchor chain was a local
2772 proposition. We sold to the American Shipbuilding Company and people around Cleveland, Lorraine and Detroit, so that it was sold FOB Cleveland. The sling chains were also FOB Cleveland. They were a small part of our business and it was just done locally with the Cleveland and vicinity customers (1657).

Hoist chain was an integral part of the chain hoists and not sold separately. It went along with the machine. The machine was sold FOB Cleveland. I testified that the

Cleveland Chain and Manufacturing Company was incorporated in 1907. I went with them at that time. David Round and Son continued in business making chain hoists and cranes, hoisting equipment, and are still affiliated or associated with the Cleveland Chain and Manufacturing Company. We have our offices together. They do not make any chain now at all. After 1907 they continued on for a little while until the Cleveland Chain and Manufacturing Company got under full production making hoist chain by the machine-made, so-called machine-made process (1657, 1658).

David Round and Son made their chain during the period 1901 to 1907 almost like a blacksmith would make it. You 2774
take a bar of iron, put it in the fire, heat it to cherry red, cut it off on the anvil, which had a chisel inserted to the correct length of the link, bend it in the shape of a "U," put it in the fire and scharf off the link and finally weld the link by link. It is a hand-made chain (1658).

* * * * * *

Examination by Trial Examiner Ballinger.

As to the difference between a welded and a weldless chain, there are two kinds of welded chain. There is a fire welded and there is the electric welded. The fire welded is made either by putting the links in a coke fire, bringing them out and welding them over an anvil horn, or they are made by dropping the links on hooks into a gas or oil 2775
furnace, maybe 16 to 18 of them at the same time, and those links have previously been formed for the chain maker. He doesn't have to form each single link. He brings them out and welds them quickly under a quick-acting power hammer (1659, 1660).

Each link is welded under this power hammer. In the electric welded process the coil of wire is fed into a forming machine, and it comes out a perfect chain, except that it isn't welded. There is a little seam halfway down in the

link on one side that isn't welded. That formed chain, unwelded chain, is then run through an electric welder, and that either automatically or by the operation of the man who runs the switch is welded electrically (1660).

That in general covers those two classes of chain, fire weld and electric welded (1660).

Now, to get to the question of the weldless chain, there are also two kinds basically of weldless chain. There is the stamped chain, which is made out of like a ribbon of steel, and quick-acting presses blank out, for instance, sash chain. It is a link that looks something like a butterfly before it is bent in the middle, and those formed stampings
2777 are then transferred over to a quick-acting machine that punches them in the middle and threads them together faster than that (indicating), and it comes out a long, weldless stamped chain, sash chain and plumber's chain (1660, 1661).

Direct examination by Mr. Kittelle resumed.

* * * * * *

Then you have this next class of weldless chain which is made out of wire. The coil of wire is fed into weldless chain-making machines, and it automatically forms and ties that into knots, as you see it there, and it goes in as wire and comes out the other end of the machine as a finished chain, except for the plating or polishing that you do on it
2778 to make it look attractive to the buying public (1661, 1662).

* * * * * *

Generally speaking, it is correct to say that the fire weld is used on the larger sizes and the electric welding on the smaller. There is a breaking point where it is more expensive to weld with electricity than it is to weld by fire. That point is usually around $\frac{7}{8}$-inch diameter of the steel (1663).

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The weldless chain we made in a limited way when we first made tire chains. That would be along in 1910 (1665).

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Cleveland Chain and Manufacturing Company started manufacturing tire chains about 1909. We did not think at the time that American Chain and Cable Company's patents on tire chains were any good, but later they proved they were. We went along for maybe a couple of years, and a suit was finally started by the American Chain or their predecessors in Chicago against Excelsior Supply Company, I think it was, for infringing. The American Chain Company or its predecessor won that suit. Then, of course, the other courts just issued injunctions like one brick knocking another one over, so we got out of the endless or standard type of tire chain at that time, which I believe was about 1911, or so (1667, 1668).

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Subsequently, while American's patents were still in existence, we had a chain which was much more convenient than the American endless type. We had a chain that was cut in half, and each half was anchored to the opposite spokes. They could be put on in a mud hole or snow bank, any place at all, with no trouble at all. They were clumsier and didn't take as well with the trade, but we sold thousands of them. American didn't sue us for infringing because they couldn't. Their patent was sustained on its ability to creep around the periphery of the tire, and these couldn't creep (1668).

"Mr. Steinhauer: Was that patented?

"The Witness: No, we didn't patent that" (1668, 1669).

Direct examination by Mr. Kittelle resumed.

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We made it for approximately 10 years, until we got into the standard type, when American's patent expired. We first started making the standard type in 1921, I think it was. We still make that. We have a type of reinforced tire chain. We have what we call the Master Grip reinforced tire chain. It isn't patented (1669).

* * * * * *

The Cleveland Chain and Manufacturing Company bought the Seattle Chain and Manufacturing Company about in 1920 (1670).

"Mr. Steinhauer: That is, Cleveland bought them?

"The Witness: The Cleveland stockholders. We bought —the same stockholders bought the Bridgeport Chain and Manufacturing Company in 1928" (1670).

Direct examination by Mr. Kittelle resumed.

That one was the Bridgeport Chain in 1928. The same stockholders organized the Round California Chain Company in 1931. The Cleveland Chain and Manufacturing
2783 Company bought Woodhouse Chain Works in 1947 (1670).

"Mr. Steinhauer: What date in '47?

"The Witness: About January. I think the deal was consummated in February, but early in the year" (1670, 1671).

Direct examination by Mr. Kittelle resumed.

The Seattle Chain and Manufacturing Company made all types of welded chain, including anchor chain, conveyor chain, hook chains, logging chains, sling chains, and the proof coil chain for the hardware trade, when we took them over, and later they added the electric welded process, the Union melt process for making stud link chain in the large
2784 sizes, two and a sixteenth inch diameter material, and that is the same chain they make today, except that they supplement it by assembling tire chains which we ship from the East. We send the bulk chain, and they cut it up and assemble it and pack it and market it out there. By "we" I mean Cleveland Chain Company ships it from Cleveland (1671).

As to the Round California Chain Company, we started the company and their line paralleled the Seattle line (1671).

"Trial Examiner Ballinger: When did you start?
"The Witness: In 1931" (1671).

Direct examination by Mr. Kittelle resumed.

They presently assemble tire chains the same as Seattle, even in sunny California (1672).

Woodhouse makes all types of fire welded chain and have a couple of welders for making electric welded chain, and some forming equipment which they are trying to put on a production basis, but so far it hasn't gotten to that stage. As to whether we sell them tire chain parts to assemble, we have lots of orders from them, but we have not shipped very much to them yet, but we will. That is our plan 2786
(1672).

Woodhouse has sold tire chains for years, assembling them, but never manufacturing, just the assembling part of it, unless it is some that could be made fire welded. As to where Woodhouse bought its parts for assembling tire chains before Cleveland acquired Woodhouse, I saw barrels in there when we went through the plant, marked McKay Company, and some from the American Chain Company. I don't know definitely, though. Woodhouse Chain Works made no weldless chain at all. Neither Round California or Seattle Chain Company makes any weldless chain. Neither of them makes any tire chain other than the assembly which I described. They just assemble them (1672, 1673). 2787

Bridgeport Chain and Manufacturing Company made the full line of weldless chain that they make today, except that now we have added bead chain. A bead chain is key ring chain, electric light pull chain, and sometimes used for ornaments, strings of beads around women's necks, and so forth, and now, of course, they sell David Round and Son chain hoists, trolleys and winches, that hoisting machinery line, plus Cleveland's welded chain line, and

they also assemble tire chains and sell the tire chain line in the same manner as Seattle and Round. They were dying a slow death before we took them over and they had to have additional lines to live, dying of starvation (1673, 1674).

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Our plant at the Seattle Chain and Manufacturing Company is a fairly big plant for a fire welded plant. They don't employ so many workmen. When business is good they would get up to around 75 employees. Round California are not as large. They probably employ 25 to 35 people. Woodhouse would be about 35 to 50, I would say,
2789 in normal times. As to Bridgeport, roughly a hundred (1675, 1676).

"Mr. Steinhauer: Employees, that is?

"The Witness: Employees, yes" (1676).

Direct examination by Mr. Kittelle resumed.

As to the Cleveland Chain and Manufacturing Company, our Cleveland plant has, when we get all the help we need and want, close to 500. Each one of these companies that I have described has just one plant. Bridgeport Chain and Manufacturing Company is in Bridgeport, Connecticut; Seattle Chain and Manufacturing Company, Seattle, Washington; Round California Chain Company, South San Francisco, California; and Woodhouse Chain Works, Tren-
2790 ton, New Jersey. Woodhouse makes stud link anchor chain. Round California also makes it. Seattle and Cleveland make a small amount of it (1676).

Stud link anchor chain is sold usually FOB factory, unless the customer asks for a delivered price. If the customer wants a delivered price we add it from the factory where it is made, not from Pittsburgh (1677).

There is a practice among these affiliated companies of ours of selling products one to the other. We merchandise

each other's products. It is an actual sale from one to the other, paid for each month, just the same as any other business transaction (1677).

In 1907, when I went with the Cleveland Chain and Manufacturing Company and they were just formed, they sold welded chain FOB Pittsburgh. I testified that previous to that David Round and Sons had sold all of its chain locally around Cleveland at an FOB Cleveland price. As to why Cleveland Chain and Manufacturing Company, when it was organized in 1907, started selling on an FOB Pittsburgh basis, we wanted to enlarge our field of operations, and the only way to do that was to meet conditions that then existed in the different cities and sell on the same 2792
freight basis the other fellow did; otherwise we would be circumscribed by a very limited area (1678).

David Round and Son made a hand-made chain, a high-quality product that was just sold locally for use on cranes and dangerous overhead lifting. The Cleveland Chain and Manufacturing Company made chains that went to the farm trade, to the general hardware stores all over the country. It had a wider coverage and bigger field (1678, 1679).

I did not nor did anyone in Cleveland Chain and Manufacturing Company, to my knowledge, have any conversation or discussion with competitors about adopting this Pittsburgh plus basis in 1907. We found out the basis on which competitors were then selling welded chain by getting the prices from our local hardware stores that we 2793
were purchasing materials from; our friends there very gladly gave us the information (1679).

It has been the policy of Cleveland Chain and Manufacturing Company from 1907 to date to employ the FOB Pittsburgh basis of selling on welded chain. I don't see how we could sell on any other fairer basis (1679).

I have never overheard any discussion among competitors with regard to this Pittsburgh plus or FOB Pittsburgh

method of selling welded chain. We could change to some other method of selling welded chain tomorrow, if we felt it was the best thing for our business. As to why we continue to use that method at the present time, I figure there has to be some common basing point. We don't care whether it is FOB Cleveland, FOB Chicago, FOB New York, so long as there is a common ground on which we can meet the prices of our competitors. We can't sell chain at a higher price than American Chain, Taylor, International, or anybody else, and we can't make a price FOB Cleveland and ship into Pennsylvania, Pittsburgh, for instance, or New York, and add on the freight because their
2795 factory there making their price FOB New York, for instance, would right away beat our price. So, as long as there is a central point, and we add on the freight from that central point, we are competitive, so it is just to be competitive. That is all we care for (1681).

I am familiar with the Donnelly Freight book, which is issued or has been issued by the Chain Institute. Our company has received copies of it. We don't make a practice of using it. We have two other services that we use, the Climax Traffic Corporation in Chicago, and the Commercial Traffic Company in Cleveland. We use these two services on welded chain and on tire chains, to obtain rates. We also use them on weldless (1681, 1682).

Climax Traffic Service furnishes us with traffic information on cards. We pay, I don't know whether it is $25.00 a
2796 month or some such fee for the service. Each card gives the rate from Pittsburgh to a destination, and from Cleveland to that destination. When the rates change for some reason, they send us a new set of cards on the points where it changes. We order the points that we want. This commercial traffic company in Cleveland also pays our freight bills. We deposit maybe a couple of thousand dollars to them and they issue checks on it (1682).

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We deposit it in the bank and they issue checks to pay our freight bills after they audit them, and we replenish that money as it runs out. We telephone them daily for rates that are not shown in the Climax cards or any other rates that we may want. As to how and when we first happened to employ the services of Climax, we had an original branch company, the Krein Chain Company, at Wapakoneta, which we bought out in 1914. They were a fire welded chain plant and had upwards of 250 employees there. They took on this Climax traffic service in Chicago, and after we shipped some of their machinery out West and brought the rest of it to Cleveland, their manager came to Cleveland, and he is still there in Cleveland. He had a decided preference for Climax, so we continued the service along. We found it a good one and continued it (1683).

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Donnelly's, on the other hand, we found did not have all the points in it that we shipped to, so after using it a short time we discontinued it and went over to Climax and the Commercial Traffic in Cleveland (1683).

* * * * *

The machinery used for the manufacture of welded chain is entirely different from that used for the manufacture of weldless chain (1688).

The Donnelly Freight Book, Commission's Exhibit 876-A through a lot of other numbers, is usable for weldless chain. It is usable because the rates are the same, but it is not used for the purpose at least not to my knowledge because Pittsburgh isn't any basing point on weldless chain. There are no shipments of weldless chain made from Pittsburgh. There would be no reason to ship from that point. There is no freight equalization whatsoever with Pittsburgh on weldless chain. When I say the rates are the same, I mean the Railroads Classification Committee makes no differential between weldless and welded chain rates on any shipments you make into different territories. You can ship three-sixteenths weldless chain or one-eighth weld-

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less chain at the same price you can ship three-sixteenths welded chain into the territory. I mean the same railroad rate (1689, 1690).

"Trial Examiner Ballinger: Is the raidroad rate based on poundage?

"The Witness: Yes, sir. It is based on poundage. That is correct" (1690).

Direct examination by Mr. Kittelle resumed.

I testified that our company's stockholders bought the Bridgeport Chain and Manufacturing Company about 1928. As to the method of selling weldless chain then being used
2801 by the Bridgeport Chain and Manufacturing Company, I have seen their discount sheet, and they were selling f.o.b. Bridgeport, freight equalized with Cleveland, which were the only two points then making weldless chain, I believe (1690, 1691).

The first discount sheet that the Bridgeport Chain and Manufacturing Company got out after we acquired them took into cognizance or into consideration the fact that American Chain Company moved its weldless chain plant from Bridgeport to York some time around there, and the price was made f.o.b. Bridgeport, freight equalized with Cleveland, and the American Chain Company's new manufacturing point at York, Pennsylvania (1691).

As to my recollection of the time when the Cincinnati
2802 Pump Company first got into the weldless chain business, they are a small outfit making a small line of chain, and the first time that I ever heard of them was in the NRA days. That was my first knowledge of them (1691).

At that time the Bridgeport Chain and Manufacturing Company equalized freight with Cincinnati on pump chains and on what we style Brown chain American styles of Tenso which were the two kinds of chain that the Cincinnati Pump Company made. There was no equalization

with Cincinnati on any product that was not made at Cincinnati (1691).

I do not remember when Holland, Michigan came into the picture as a manufacturing point for furnace chain. It would be in the 1930's, but I couldn't definitely pin it down. There again is a company making just a single item—furnace chain. Not an important factor in the whole line. The Bridgeport Chain and Manufacturing Company makes furnace chain. They equalize with Holland on the freight rate (1692).

The Cleveland Chain and Manufacturing Company does not make furnace chain. We sell it. We get it from Bridgeport. We equalize with Holland on shipments into 2804
Chicago and points where the freight from Holland would be cheaper than from Cleveland (1692).

There have been within the past several years other manufacturers of weldless chain quoting and selling f.o.b. some point other than Cleveland, Bridgeport, York, Cincinnati or Holland, Michigan. The Western Chain Company, Chicago, makes some weldless chain and sells it f.o.b. Chicago, and the Peerless Chain Company, Winona, Minnesota, also makes some weldless chain, and, I understand, they sell theirs f.o.b. Winona. I know they sell it that way (1692, 1693).

None of our companies have as yet equalized freight with Chicago or Winona, Minnesota to meet that competition. We have had so much business that the question of freight equalization has not entered into the picture to 2805
any extent with them. Their line also is not a complete line. If, as and when we get back into a buyer's market in this country we will equalize with them (1693).

As to whether or not I have, or whether or not to my knowledge anyone with our company has ever had any discussions with competitors at any time with regard to this method of selling weldless chain, that is, by selling f.o.b. certain plants and equalizing with other manufacturing

points—during NRA days, when Cincinnati Pump Company was brought in, we would talk the thing over and establish that as a basing point. Outside of that, no. If our company wanted to sell on any different basis, they are free to change at any time (1693, 1694).

When Cleveland sells something to Bridgeport or Bridgeport sells something to Cleveland we have special net interfactory prices, lower than jobber's prices, which will allow them to sell at jobber's prices and make some money on the transaction (1694).

The net prices are lower than the price the buying company will resell for, so they make a profit. That covers all
2807 types of chain (1694).

On welded chain, I testified that the Seattle Chain and Manufacturing Company on the Pacific Coast and also the Round California Chain Company make principally fire welded. They buy the tire chain material from Cleveland, and also the smaller sizes, the hardware sizes of electric welded chain from Cleveland, and they buy the weldless wire chain from Bridgeport (1694, 1695).

* * * * * *

Our two associated companies on the Pacific Coast sell welded chain with respect to delivered prices, using the same base price as we do in the East. By "we" I mean Cleveland Chain and Manufacturing Company. They add to that the carload rate of freight on chain, plus a small
2808 extra for handling in and out of their factory warehouses or warehouses that they have on the Coast. So that at the present time they are selling chain on the Pacific Coast at $1.70 per hundred pounds over the price of chain in the East. I want to refer to a memorandum in my pocket as to freight rates. That same chain, if the jobber purchased it from any factory in the East, would cost him $3.67 per hundred pounds freight as against the $1.70 that we charge him. Seattle Chain and Manufacturing Company and

Round California Chain Company charge him on the Pacific Coast (1696, 1697).

$3.67 is the l.c.l. rail rate of freight on chain today: $3.34 plus 10 per cent, or $3.67 per hundred pounds. The present carload rail rate from Cleveland to the Pacific Coast on a forty-thousand-pound shipment is $1.34 plus 10 per cent, or $1.47 per hundred pounds, as against the $1.70 which we charge a customer on the Coast. But we have to haul that chain into the factory, cut it up into short pieces as the customer orders it, and go to a considerable expense that way. In addition, if that chain is shipped, for instance, to Portland, Seattle Chain and Manufacturing Company has to absorb the freight from Seattle to Portland, so that that difference of 23 cents has to handle the warehouse cost in and out and also the freight allowance along the Coast, because all along the Coast are basing points, original steel basing points. For instance, out of Seattle we allow freight to Bellingham, Tacoma, Everett, Portland, Aberdeen and Hoquiam (1697, 1698). 2810

A customer will pay the same price for this welded chain landed at any one of these points that I have named. And in San Francisco or Los Angeles stock it is delivered to San Francisco, Oakland, Los Angeles, Sacramento, Stockton, San Diego, San Pedro and Wilmington, so that all up and down the Coast they get the benefit of practically the carload rate of freight from the East on any size shipment, if it is a hundred pounds or five hundred pounds or a thousand pounds or two thousand pounds. They get the benefit of the carload freight from the East plus this small amount of handling charge, and included in that is insurance and incidental expenses. There may be even three per cent on top of that for a tax. I wouldn't be surprised but that there was. This handling charge is about 23 cents per hundred pounds (1698, 1699). 2811

When I say that this chain is taken into the plants and cut up, I am referring to the plants of Seattle Chain and

Manufacturing Company and Round California Chain Company. And also to a warehouse that we have in Los Angeles, which is fitted for cutting up chain into the designated lengths that a customer specifies. There is no difference between the railroad freight rates from Pittsburgh to the Pacific Coast and the railroad freight rates from Cleveland to the Pacific Coast. The railroad rates from Pittsburgh and the railroad rates from Cleveland are identically the same to the Pacific Coast, and I believe also to the inter-mountain sections, like Salt Lake City and some of those points. If a buyer out on the Pacific Coast wants to buy a full carload of chain for shipment from Cleveland
2813 directly to him without going through our Seattle plant or our San Francisco plant or our Los Angeles warehouse, we will sell it to him on the basis of f.o.b. Cleveland, which is the same as f.o.b. Pittsburgh, and let him pay the freight from the plant to the Coast. We don't aim to make anything on it at all. He does not have to pay this 23 cents handling charge (1699, 1700).

If a customer wants to wait long enough for us to accumulate a carload, we will ship his chain in what we call a pool carload, so that if two or three jobbers want to order a few barrels of chain from Seattle Chain and Manufacturing Company or Round California Chain Company, we will include those in a carload that is going out to those points, and they are dropped off and they paid the railroad the carload rate of freight to their drop-off point, plus what-
2814 ever charge the railroad makes for stopping the car there. It is a small charge. But they get the benefit of it all. We don't make anything on the freight (1700).

What I have said with respect to using carload rates of freight in computing our prices on the Pacific Coast has been true ever since we took over the plants out there. We established it along about 1920 (1701).

"Mr. Steinhauer: What year was that?

"Mr. Kittelle: I was talking about the 1930's.

"Mr. Steinhauer: I know, but he said ever since they took over the plants.

"The Witness: When we took over the plants in 1920 or thereabouts, we adopted that policy. It was approximately that date" (1701).

Direct examination by Mr. Kittelle resumed.

We have used water rates instead of rail rates when water rates are cheaper and the service is good. We have given the customer the benefit accordingly. For instance, this one sheet here in 1941 shows for shipment via water from the East add $1.05 per hundred pounds for your net cost to these various points; for shipment from San Francisco or Los Angeles stock add $1.15 per hundred pounds for your net cost, freight equalized to these various points, so that the customer gets the benefit of water or rail rates, whichever way the goods are shipped (1701, 1702). 2816

At the present time, I might add, we are shipping by all rail to give the customers better service, and the difference in freight isn't too much today. It used to be considerable. Today the carload water rate is $1.30½ and the forty thousand pound carload by rail is $1.47, as I quoted before, making a very small difference (1702).

When the Seattle Chain and Manufacturing Company or Round California Chain Company sell on the Pacific Coast a welded chain product that they have manufactured themselves in their own plant—the fire welded stuff, they sell it on exactly the same basis as this—just the same as if it were purchased from the East. And there is a reason for that (1702). Their cost is higher on the Pacific Coast. Primarily the cost of the raw material is higher. The bars or rods out of which the welded chain is made cost 70 cents higher per hundred pounds than it does in Cleveland and in the East, if I am not mistaken (1702, 1703). 2817

I will refer to the Iron Age dated October 16, 1941. It shows carbon steel bars at $2.90 per hundred pounds in Pittsburgh, Chicago and Cleveland and $3.62½ in San Francisco, Los Angeles and Seattle. So that there is 72½ cents per hundred pounds that they have against them out there when they start to make the chain. In addition to that the labor is much higher along the Pacific Coast, we have found, than corresponding labor in the East, so that they have to have that same freight rate to protect them. Then also the freight equalization along the Coast has to be absorbed on the welded chain that they make just the same as the chain that comes from the East (1703).

2819 On wire chain, if we established a plant out there to make electric welded chain it would cost $1.01 per hundred pounds more than in the East for the raw material. In Cleveland the base price is $3.55 per hundred pounds. On the Pacific Coast it is $4.56 per hundred pounds for the same material (1703).

Then you want to take into consideration also that we would be paying this higher price on all the material used in making that chain, and there is approximately ten per cent of the material scrapped, so that the freight would cost us—or material—over $1.10 per hundred pounds more to start with on the Pacific Coast, as against the $1.70 that we now charge on the Pacific Coast for the same chain shipped from Cleveland, so it wouldn't be economical to make it out there on the Pacific Coast. I have described

2820 the method of selling welded chain out there (1703, 1704).

These two Pacific Coast companies of ours sell weldless chain which they have purchased from Cleveland Chain and Manufacturing Company or Bridgeport Chain and Manufacturing Company on exactly the same basis as they do the welded chain where they take the same freight rate from the East, and that covers everything except brass chain. On brass chain, it doesn't mix with carloads of steel chain and takes a higher rate, which I believe today is

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$4—I believe it is $4.70. But in this sheet dated August 5, 1946 it shows $4 per hundred pounds. However, there is only a small amount of that chain used on the Pacific Coast—not enough to get it in there in carload lots (1704).

It is shipped out there l.c.l., or if it is shipped with a carload it is billed by the railroad as an l.c.l. shipment. We do not benefit by the carload rate in any manner whatsoever. In that instance our Pacific Coast price is figured on the basis of adding an l.c.l. rather than a carload rate of freight from the East on one small item, brass chain only (1704, 1705).

The two Pacific Coast companies of ours sell tire chain on a delivered basis. It is f.o.b. San Francisco, f.o.b. Los Angeles, f.o.b. Seattle, with full freight allowed to whatever point they are shipped to. We are not very rigid about a quantity limitation on the freight allowance. There is something to that effect printed in our price sheets. I couldn't say definitely, but the records will show that we specify maybe 24 pairs or maybe it is 250 pounds. I don't know. But it is a nominal amount, anyway, that they have to order to get the freight allowance (1705).

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These associated companies of ours get information on freight rates locally, so far as I know. We do not furnish them from the East. That is one detail of their business that they handle along the Coast, and I am not there often enough to know just how they handle that. But I am sure it would be from the local sources, either the railroads or some local freight rate agency (1705, 1706). The Bridgeport Chain and Manufacturing Company gets freight rate information from the local railroads (1706).

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Yesterday I testified about a period prior to 1921, when we were making tire chains which the American Chain and Cable Company, then known as Weed Chain Tire Grip Company, thought were infringements of their patents and they sued us and we stopped. As to the method of selling of tire chains during that entire period prior to 1921, we

allowed freight on them. They were sold f.o.b. Cleveland with full freight allowed (1706).

The result was that the customer paid the same price anywhere delivered. As to how extensively, geographically speaking, that we sold tire chains during that period prior to 1921, we had quite an extensive mailing list and sold them pretty well over the snow belts: New York, Pennsylvania, Ohio, Michigan, Chicago, and various points (1707).

As to the comparison of our price for these tire chains prior to 1921 with the price of the Weed Chain Tire Grip Company or American Chain and Cable Company on their
2825 patented tire chains (they had a patented chain, the basic patent), our price was naturally lower. Ours was an unadvertised chain. We had to buy our market (1707).

I had no discussions with anyone from the Weed Chain Tire Grip Company or the American Chain and Cable Company about the method of selling that we were employing prior to 1921 on tire chains, that is, selling f.o.b. plant with full freight allowed. The only time I met any of their heads was along in 1910, when Frederick Duncan and Mr. Lasher, the president, came to Cleveland and warned us that if we did not stop selling and making those chains they would sue us for infringement, and we had no discussion about the method of selling them at that time (1707, 1708).

We did have occasion to keep informed as to what prices
2826 American Chain and Cable Company were charging for their tire chains before their patent expired and after their patent expired in 1921. We were very much interested because we were figuring on going into the so-called standard chain immediately upon expiration of the patent. As to finding out about their prices, their price lists were easily obtainable by our friends in the automotive jobber business: Pennsylvania Rubber and Supply Company, M and M. Company in Cleveland, and so on. It was an easy matter to get them (1708).

There was a big change in American Chain and Cable Company's prices on tire chain at the time their patent expired as compared to what their prices were just before it expired. They dropped the list approximately 33⅓ per cent, presumably to discourage some of the rest of us from going into the business. We went into the business, notwithstanding. As to the comparison of our prices with those of American Chain and Cable Company on tire chains then, we used the same list prices, the same delivered prices, as our asking prices, and then made whatever price was necessary to get business (1708, 1709).

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As to the prices we were selling at back in those days, 2828
1921, I know we copied the American Chain and Cable Company's list prices, and made a price lower than that in order to get business. We sold below our published price in practically all cases (1711, 1712).

That situation continued, that is, the practice of our publishing the same price as American but selling at a lower price, through NRA days up to, well, right through NRA days and a little after that—even in 1941. The record would show many sales at less than our published price. As to whether we had a policy of uniformly selling below our published price up to a certain point, when the Code was formed—the Code Authority—early in the Roosevelt administration, we were classed as a "B" manufacturer. The "B" manufacturers sold unadvertised tire 2829
chains. They were given or allowed an extra five per cent by the Code Authority in order to influence business their way, as against the highly advertised tire chain that Weed put out—I mean the Weed chain put out by the American Chain and Cable Company. And everybody concerned seemed to think that that was a fair enough differential for us. That continued on through NRA and even afterwards (1712, 1713).

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"Mr. Steinhauer: Just a moment. I don't think that is quite clear. I want to know if he made differentials from the price list or whether the price lists would show the prices they got."

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"The Witness: The price lists in those days would not show a lower price than the American Chain and Cable Company. The list price would be the same.

"Mr. Steinhauer: I see.

"The Witness: But the asking price would be less than their asking price, and then beyond that we would give ten per cent, or even twenty per cent with some large quan
2831 tity buyers, in order to get the business.

"Mr. Steinhauer: That was for the period of the depression, or something of that kind?

"The Witness: That period when we were out struggling to get volume tire chain business" (1713, 1714).

Direct examination by Mr. Kittelle resumed.

The list price would be the same, the consumer list price. We have published discounts to the jobbers. They were not the same as American, the published ones. I would say they were different in those days. We would sell at a greater discount and we would publish that. Eventually we changed our published prices, including published discounts, to the same level as American's. I believe it was
2832 around the period when tire chains became short. The demand was heavy, material was hard to get and orders were easy to get (1714, 1715).

At that time we continued to try to sell regularly below our published prices. We protected certain customers—large buyers—and gave them inside prices below the published prices. That was the bigger buyers and not necessarily everybody. Back in 1921, when we first started to make this regular tire chain which had been subject to

American Chain and Cable Company's patents, but which patents had expired, we sold those regular tire chains on the basis of a list and discount. We had the delivered price system then of f.o.b. Cleveland, with full freight allowed to the destination where they went, and also a quantity had to be shipped so that we did not have to pay a minimum charge on one pair of chains which would more than use up all the profit on the shipment (1715-1716).

This minimum charge system of the railroad works this way: If you ship ten pounds by freight you will pay the same rate—the same charge, rather—as shipping a hundred pounds. Everything over a hundred pounds is computed at the rate per hundred pounds, so that a manufacturer 2834
is penalized in making a single shipment of, say, fifteen or twenty pounds. On one set of tire chains he would have to pay around two or three dollars to get it out to Salt Lake City. The chains themselves would sell for around $4.50 (1716).

Examination by Trial Examiner Ballinger.

If he shipped a single set of tire chains weighing fifteen pounds, he would pay the same freight that he would pay on a hundred pounds (1717).

Direct examination by Mr. Kittelle resumed.

He would pay the same number of dollars as if he had 2835
shipped a hundred pounds (1717).

I have never had discussion at any time with any competitors of this tire chain method of selling f.o.b. mill with full freight allowed. We just took it for granted that it was the best way of selling. I have never overheard any such discussion among competitors at any time (1717).

As to what would happen to the Cleveland Chain and Manufacturing Company if it were compelled to or tried to sell its product f.o.b. Cleveland without freight allow-

ance and all other chain companies were required to do the same thing, first, there is the Columbus McKinnon Chain Corporation plant within 190 miles, approximately, of Cleveland, on the one side. There is the Taylor Chain Company approximately 330 miles from Cleveland in another direction. That would limit our spread in the East and West to about half of those distances. We would have to divide the territory then with those two large factors in the business, who would likewise be hungry for business around their home base (1717, 1718, 1722).

Then the worst factor would be the Hodell Chain Company, which has a large manufacturing capacity of tire
2837 chains right in our home town. There is very little business in and around Cleveland. It is a poor tire chain territory. The hills are salted and cindered. Detroit is another bad city. So that we have a very poor field to draw from. Pittsburgh, on the other hand, is a good field, but that is fairly close to York, Pennsylvania, and the three large manufacturers there, who would be fighting among themselves to get enough business to exist on. So I fail to see how we could survive under conditions like that if we were not privileged to meet the other fellow's price in his territory. I certainly would not want to do business that way—could not do business that way (1722).

Examination by Trial Examiner Ballinger.

2838 That opinion is predicated upon the theory that the cost of manufacturing chains is substantially the same in all of these factories. We use primarily the same welders. We used automatic welders. Each, as a general rule, designs his own machinery. But the experts came from American Chain and Cable Company into our plant when we started up to help us design ours. In other words, we pirate—take them away from the American Chain and Cable Company. They go from our plant to the Western

Chain Company in Chicago, so that Western Chain Company we know has identically the same machinery—made from our blueprints—and therefore we have absolutely nothing on them as far as production is concerned. The machinery is the same. The output per man would be the same (1722, 1723).

The heat treating is all done in rotary furnaces. The American Chain and Cable Company heat treat or case harden their cross chains in rotary type gas furnaces. We do the same thing. The McKay Company does the same thing, and I will venture to say that each of the others does the same thing too. I have seen a number of them—I have gone through their plants and seen the same furnaces 2840
operating (1723).

So that basically there is very little difference in the cost of producing the chains, and they are all the same—same weight, electro-galvanized, brass-plated, or similar finishes, which cost approximately the same per hundred pounds to do. So that none of us has the edge on anyone else, in my opinion. I concede that there may be a slight variation but I think the variation is so slight that it would not affect the result (1723, 1724).

Direct examination by Mr. Kittelle resumed.

If we had to sell f.o.b. our plant and everybody else had to do the same thing—stay in his own territory, it wouldn't keep us running one month out of the year. We 2841
have another plant there in Cleveland, the Hodell plant, who would also have to draw on that same territory. Our costs per unit of tire chain if our business was cut down to that extent and we still tried to operate, would be very much higher. For instance, if our superintendent gets a thousand dollars a month and the plant produces a thousand tons of tire chains a month, it costs only a dollar per ton for those tire chains to pay his salary—that part of

the overhead. On the other hand, if we cut down—if we were cut down—to a hundred tons it would be just ten times that much, or ten dollars per ton overhead on those same tire chains. As you know, the smaller your production, the higher the cost (1724, 1725).

With respect to welded chain on those same facts, that we had to sell f.o.b. Cleveland and couldn't equalize or allow freight, and that everybody else had to do the same thing in his plant, the effect would be even worse because on welded chain we have a new factor entering here. We have the Carroll Chain Company at Columbus, Ohio, approximately a hundred and forty miles from Cleveland
2843 (1725).

There is also the American Chain and Cable Company and the McKay Company, both of which would enter into our territory by reason of their manufacturing fire welded chain in Pittsburgh or the suburbs of Pittsburgh—McKee's Rocks and Braddock. So that we would have still more of a fight for the so-called pound chain or welded chain business than on the tire chains, and there certainly is a very limited field for that class—the welded class of business in our immediate territory (1726).

If the same condition obtained with regard to weldless chain, that is, sell it FOB Cleveland with no freight equalization or no freight allowance, that would affect the business of the Cleveland Chain and Manufacturing Company as follows: We would have one of our biggest competitors
2844 in the weldless line fighting us for what little business there was in the territory adjacent to Cleveland, and then York, where our other large competitor is, and Chicago, where Western Chain also makes the weldless chain, so that we would get pretty poor pickings out of the territory and certainly not enough to make any money on it. It eventually would result in a price rise to the consumer, or some of us would go out of business (1728).

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On welded and weldless chain the various manufacturers of those products in the United States use the same raw materials. The machinery throughout the United States is practically carbon copies in most of the factories, with little variations here and there as their own designers have changed it around, but basically it is the same. I might state I have been in quite a number of the plants, the Peerless Chain Company, the Western Chain, the McKay Company in Pittsburgh, and Columbus McKinnon Chain Corporation, S. G. Taylor Chain Company, and so I speak from knowledge on the thing (1729).

At your request, I wrote to the Carroll Chain Company for a copy of their price list. Respondents' Exhibits 36-A, B and C for Identification are quotation sheets of the Carroll Chain Company, Columbus, Ohio, effective March 1, 1947, including their discount sheets No. 16 and 16-EG, applying. As a result of my request I received these papers from Carroll direct (1729, 1730). 2846

All that the Carroll Chain Company makes is the welded chain, including stud link, and the heaviest sizes. The prices on this list are generally the same as the American Chain and Cleveland Chain and other companies had in effect last March when that was printed (1732).

"Mr. Kittelle: The record should show that this price list, which is Respondents' Exhibits 36-A, and the two discount sheets, which are Respondents' Exhibits 36-B and C, bear date, effective date, of March 1, 1947, and further they show that all of this welded chain which was quoted by the Carroll Chain Company here is quoted on the FOB Pittsburgh basis. 2847

"The Witness: May I see the price on one item?

"(The document was handed to the witness.)

"The Witness: There may be a variation in the price on their dredge chain, which is a quality chain article, and each manufacturer on an item of that kind frequently changes to suit his convenience.

"Mr. Steinhauer: Specifications, too?

"The Witness: Specifications and quality of iron used" (1732, 1733).

Direct examination by Mr. Kittelle resumed.

As to the period of time that I have known of the Carroll Chain Company being in the welded chain business, they go back to when Dan Carroll organized the business at the time the McKinnon Chain Company bought out the old Columbus Chain Company, and that must be, oh, between 15 or 20 years ago, I would say. To the best of my knowledge the competition we have always experienced with them
2849 has always been on the FOB Pittsburgh basis (1733).

As to whether there is any particular market or markets in the United States that are good markets for tire chains year in and year out, you can't guarantee that you will get snow in any given spot every year. One year you will get your business in blizzards along the east coast. The turnpike where I went through had one last year, a terrible blizzard; in another year it will be around Chicago and a different spot, and then again in maybe Ohio, so that you could not pick out any one section and say they were going to be fine tire chain sections for 1947-48. It is impossible (1735).

As to these places up in northern Minnesota and Iowa and Wisconsin, about Minnesota and that territory, the
2850 same condition would prevail up there as does throughout the rest of the country, although you would expect there would be more snow in the far northern states. It doesn't work out that way (1735, 1736).

Presently we do not have any warehouse stocks of tire chains. Stocks are exhausted. In the past we have had warehouse stocks. We have carried large stocks in Chicago, in Boston, in Bridgeport, in New York, in addition to jobber stocks on a semi-consigned basis. In Bridgeport our

stock was with the Bridgeport Chain Company. We had similar stocks in Seattle, San Francisco and Los Angeles. We have gone into the consignment basis of furnishing stocks to jobbers on tire chains. We have supplied chains on consignment to our sorrow (1737).

At the outset we consigned the entire stock. Then we got down to the point where we consigned a portion of it, about half of it, and he paid for the other half. When I say the entire stock, I mean the jobbers shipments rather than our entire shipments. We have offered consigned stocks to all jobbers indiscriminately (1737, 1738).

Jobbers have been reluctant to carry the full amount of stock needed to take care of their requirements in their territories during the winter. They don't want to tie up money in tire chains which become obsolete when tire sizes change. When the new cars come out, they generally have new tire sizes, and that means a lot of chains are obsolete, and then there is always a fight about whether the customer stands the loss or whether the manufacturer stands it, and eventually the manufacturer has to stand it, but it is a source of friction (1738). 2852

"Mr. Steinhauer: By 'customer', you mean jobber?
"A. Yes" (1738).

Direct examination by Mr. Kittell resumed:

As to my experience with a severe blizzard in a particular locality which depleted tire chain stocks there, I remember in particular one in Georgia a number of years ago when we were called on the telephone and the jobber there excitedly wanted us to ship about a thousand dollars worth of chains by express. He said they had a terrible blizzard down there and they were stuck for chains; there were none in the territory. After looking up his rating in Dun and Bradstreet, I told him we would ship [illegible] if he would take 2853

them COD. We shipped that way, and I kept my fingers crossed until they were accepted and paid for. In a few days he called up and ordered a similar amount. He had sold all those and wanted another big load of chains by express. He paid for both lots. We have had calls as far as Seattle, Washington, when the plant out there has exhausted stocks. The Boeing people wanted upwards of a thousand pair of tire chains during the war when they had a blizzard up that way, so their men could get back and forth to the plant. Yes, it is a common occurrence (1738, 1739).

* * * * * *

2855 Very often it happens that we in Cleveland would buy some product from our Bridgeport company and have it shipped to Cleveland and then ship it back to a customer located in the east. We carry a stock of their products in our plant in Cleveland. We do it for service to our customers. Our customer, for instance, in York, Pennsylvania, may order from us, and we ship into York not only the welded chain that he orders, but also the weldless, because if it is only two or three hundred feet, he wants the shipment to come in all at one time on one invoice, and he doesn't want to be bothered with two or three pick-ups at the railroad station and two or three invoices to audit and pay. Yes, we do that right along. If a man in the east orders or sends an order in for something that is made entirely at Bridgeport and doesn't want any of our own
2856 Cleveland products, we mail the order to Bridgeport for direct shipment to the customer in the eastern territory (1742, 1743).

I testified that these companies (Bridgeport, Seattle, Round California and Woodhouse) have the same or substantially the same stockholders, with one exception, and that is the Woodhouse stock that is owned by Cleveland Chain Company. They have the same directors and the same officers, although the officers are transposed—that

is, they have different titles in different companies (1743, 1744).

During the NRA days, I was Chairman of the Code Authority during the entire period of the Code. I remember two of the government representatives on that Code. There was a Colonel Sanderson and Larry Martin. I think I attended all of the Code Authority meetings as Chairman (1744).

As to the subjects discussed there, the FTC would put us in jail for it today if we discussed those same subjects. It was price maintenance, largely. The Government was interested in bringing back industry and putting men on the payroll, and that was the basic idea, as I understood it at 2858
the time, of the NRA, to help business and to help the country. It was the understanding under the Code that when a man filed his prices he was to maintain those prices (1744, 1745).

* * * * * * *

I knew Mr. Irving S. Paul, who was Managing Director of the Chain Institute before Mr. Merriman. I know Mr. Merriman. As to what Mr. Paul said to us with regard to what was proper in a trade association in the way of discussing prices, it was as follows. When NRA was leveled off, the chain manufacturers continued under the Chain Institute, and we were told by Mr. Paul that we could not carry on the way we did under NRA, that that had been ruled illegal, and at that time we hired Mr. Dinkins, a Washington Attorney, to come into the Chain Institute as 2859
counsel and guide us in the matter of price discussions and other legal things that came up in the Institute. Mr. Dinkins set the course for any discussions we had along this line. He formerly, I understand, had been with the Federal Trade Commission, and in particular he expounded on the Maple Flooring case and told us that we were free to discuss closed transactions, but that we must positively not discuss pending transactions or future transactions.

So long as we confined ourselves to closed transactions, we were within the law, and that was the basis upon which we operated (1747, 1748).

We were warned at that time by Mr. Paul or Mr. Dinkins that we could not make any price agreements. It was illegal (1748, 1749).

When Mr. Merriman became Managing Director of the Chain Institute, after Mr. Paul died, as to what he said on those subjects of what you couldn't or could discuss, conditions were peculiar at that time. The industry was in disrepute among the jobbers and the trade generally. We were a bunch of price cutters, and we were getting nowhere fast,
2861 and Mr. Merriman came in and preached to us along the same line that Mr. Dinkins had, that we could talk about closed transactions but we must not talk about about anything else. One of his theories was—and always has been—he told us a certain amount of price cutting was healthy for an industry; that as long as the bulk of our sales were at our printed prices, we shouldn't worry too much about the cut prices and not have a lot of hard feelings over those; that we heard all about the cut prices, but not so much about the prices that were being maintained. He was always inclined to minimize cut prices (1749).

I have participated in and overheard many of the discussions, referred to here by other witnesses in their testimony, of past transactions and price cutting that took place informally among the members of the Institute at the
2862 time of the Institute meetings. I would say that, starting with the end of NRA, these discussions continued until about 1939 or '40, or thereabouts, when business commenced to get better through the world war starting. I don't believe they were ever an official part of the meetings we had. Sometimes the matter would be brought up (1749, 1750).

As to how our company changed published prices after NRA, we obtain a copy of the price, sometimes through our salesmen on the road. Sometimes we have received it from

the American Chain Company, or whoever might issue a new price, and we immediately proceeded to follow the market and copy that price list. If the price is higher than ours, it is because steel has been up and labor has been up and conditions warrant it. If it is lower, we can't sell at a higher price than our competitors, so naturally we follow the lower price immediately (1750, 1751).

"Trial Examiner Ballinger: Do you follow the American Chain price list?

"The Witness: We follow, if McKay got out one, we would follow McKay's. We follow whoever gets it out. As a matter of fact, it so happens that the American Chain, being the biggest one in the field, generally 2864
issues the price list. I think there is perhaps a little jealousy there. They wouldn't like it if Cleveland would assume leadership and stick their chest out and issue a price list, because they feel they are the biggest in the industry and ought to know what is going on.

"Trial Examiner Ballinger: Do you ever follow the McKay price list?

"The Witness: Yes, sir, we have, when McKay has gotten out—and I think they have done it on one or two occasions—we follow that price list.

"Trial Examiner Ballinger: Suppose there is a variation between American and McKay?

"The Witness: We would follow McKay's, if it was lower. If it is higher, I would say we definitely would 2865
stick to the lower American Chain price sheet" (1751).

Direct examination by Mr. Kittelle resumed.

In other words, whichever was lower we would have to follow (1751, 1752).

American Chain and Cable Company, we generally understand, has a very fine cost system; spend a lot of money on it, and are very good at keeping cost figures (1752).

I believe we receive all of the price lists American issues to their trade. Their salesmen bulletins and things of that sort we wouldn't receive. I testified that we also picked up price lists from the trade through our salesmen, and so on. As to where we usually get them first—from American or from our salesmen or jobbers—if it is a lower price, we hear about it from our salesmen calling up and saying, "What is the matter with you fellows in Cleveland? American is out with a price so much a hundred pounds less than our price. Where are our discount sheets? Where are our prices?" (1752).

I think all of our competitors are on our mailing list for
2867 our price lists. I believe those to our competitors are put in the mail at the same time as those to the jobbing trade. I never followed it up. I think it is done all automatically (1752, 1753).

"Trial Examiner Ballinger: Isn't that the practice of the American?

"The Witness: In sending us prices?

"Trial Examiner Ballinger: Yes.

"The Witness: Well, we do buy some material from the American Chain.

"Trial Examiner Ballinger: I know it, but their price lists, don't they usually mail them to you simultaneously with the mailing of it out to their jobbers?

"The Witness: Sometimes I think they hold it back,
2868 your Honor. I think sometimes they chisel a little on that. I hate to say so in front of their counsel, you understand.

"Mr. Steinhauer: Do you know that they do?

"The Witness: Well, lots of times the dates that we receive them are much later than the date that is printed on the price sheet. That is all that I go by" (1753).

We sell some of our chains to our competitors (1753, 1754).

I am positive that none of our price lists have been mailed to Merriman for many years, or to the Chain Institute. During NRA we were required to file with the Institute. We have not received from the Chain Institute or from Mr. Merriman copies of our competitors' price lists since NRA (1754).

* * * * * *

I have not for a long time had any telephone or other conversation with Mr. Merriman on the subject of past transactions in price cutting. I did have such conversations at one time. He would call up occasionally and inquire 2870
about a certain transaction in which we were involved or somebody thought we were involved. He would say, "Somebody says that you're making such and such a price on 762's or some damn thing or other. I don't know what it is, but is it a fact? Did you make those fellows that price?" Well, if I remembered or knew anything about the transaction I would say, "Yes, we sold them at that price. That's right. We met so-and-so's competition on it. That's true." "All right," he would say, "That's all I want to know." That would be the extent of the conversation—just to verify it. He wouldn't tell me who had asked him to inquire of me. He wouldn't disclose that confidence (1764, 1765).

On one or two occasions, I have called and asked him to make a similar inquiry of one of our competitors. As to whether he reported back with any information, the answer 2871
I got was that they hadn't done it. I was reasonably sure from the report that I had that they did do it, but there was no way of proving it (1765).

Mr. Merriman has absolutely no control over our prices or business practices. He never set himself up to have any control over them (1765).

"Trial Examiner Ballinger: Has he ever at any time exercised any control over your prices or business practices?

"The Witness: No, sir, he doesn't know the chain business well enough to talk intelligently on it, or on the prices" (1765, 1766).

It is a common practice for a competitor of ours to take away a customer that has been buying from our company for a period of time. And we have taken away a customer from a competitor who had been buying from that competitor for a long period of time. We do it right along (1766).

2873 "Q. To what extent, if any, do you base your changes in published prices on your costs? A. We don't base them on our costs at all. We have a very crude cost system, if you want to dignify it with that name. We base our changes on the market. Whatever our competitors are selling chain at, that is what we have to sell it at, regardless of what our costs are" (1766).

As to how our plant happened to be located in Cleveland rather than in some other city, both Mr. Round and I are residents of Cleveland, and it is a good manufacturing center. We knew conditions there better than we did anywhere else, so it was just natural that we would locate there. Cleveland is a source of supply for raw materials for chain. There are several big steel mills there, and raw

2874 material is handy, as well as fuel oil and natural gas, which is used in the business. All the elements are there. That is why we chose it. It is a basing point for steel (1766, 1767).

I testified that the stockholders of Cleveland Chain and Manufacturing Company actually organized the Round California Chain Company. As to how they happened to select San Francisco as a plant location, we had already purchased the Seattle Chain and Manufacturing Company some

ten years previously. We found that we were not covering the southern part of the Pacific Coast in good shape at all from that plant, often enough or effectively enough, because it was over eight hundred miles away from Seattle, so our manager out there recommended that we start a plant in San Francisco or Los Angeles in order to properly serve that section (1767).

We opened up our warehouse in Los Angeles very soon afterwards. It was within a year, as I recall it. As to how our stockholders happened to purchase the Seattle Chain and Manufacturing Company, in 1914, I believe it was, we purchased the Krein Chain Company, which I mentioned previously. That was our first experience with a branch 2876
plant or an affiliated plant, and we had such good results from that that we were on the lookout for another location (1767, 1768).

Mr. Round was on the Pacific Coast, spending a vacation in the Summer of about 1920, and ran into Mr. Weeley, an old chain maker from the East Coast who had started up the Seattle plant, and from him learned that they would be interested in selling out, so with a view toward expanding in that direction we purchased the plant (1768).

As to how we happened to purchase the Bridgeport Chain and Manufacturing Company, we got a letter from Bridgeport Chain and Manufacturing Company that they were anxious to dispose of the plant. We at the same time were anxious to round out our line with the weldless line and have a complete assortment of chains, so we started to 2877
dicker with them with respect to purchasing that plant. They had lost money on it, incidentally, for years, and we felt that by adding new lines to it and supplementing their manufacture with the goods that we manufacture we could work up a nice business there, and a paying, profitable one, which has been the case (1768, 1769).

We call the manufacture of weldless chain a drug store business. You can send out an invoice about six inches

long and it may amount to maybe something like $85 or $100, whereas if you send out that many tire chains or welded chain it will amount to a thousand and sometimes three or four thousand dollars. So you have so many invoices to make out and so many shop requisitions and so many packages and all that detail work to do, that it is a hard business to make money on (1769).

As to why so many items on an invoice have so little value in the case of weldless chain, you sell a hundred-foot reel of jack chain and it will be about 85 cents or a dollar, but in the case of the welded chain line you usually sell a thousand-pound cask that will be, a hundred and twenty-five
2879 dollars. One is sold over the counter in a retail store and the other is sold in a mill supply house or to a railroad or some big commercial user, you see. It is the weldless chain that is sold over the counter in hardware stores generally (1769, 1770).

As to why Cleveland Chain and Manufacturing Company bought the Woodhouse Chain Works, we hadn't bought anything out in a long time, and we felt a little bit stale, so we thought we would get over into New Jersey and expand a little, just to keep alive and active. As to the condition of the Woodhouse Chain Works at that time, the Woodhouse family had died off and the widow was anxious to sell her share of the business, which was the majority. They did not have a full line. That was another case where they needed some life blood put into them in the way of
2880 additional merchandise. They had a very poor system of selling things (1770).

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When we sell welded chain from our Cleveland plant and we sell it in Cleveland to a buyer located in Cleveland, the price that he pays includes generally speaking about thirty cents a hundred pounds charge for freight from Pittsburgh to Cleveland. To that extent the buyer has paid an amount for freight which is in excess of the actual freight because

there is no freight at all in delivering it to the buyer in Cleveland (1773).

Where we sell a buyer some welded chain and the buyer is located in Pittsburgh, Pennsylvania, we would have to pay the freight to get it to Pittsburgh or the buyer would have to pay it and we would allow it. We do that right along. We sell in Pittsburgh and we have to pay the freight from Cleveland to Pittsburgh to deliver it. In that instance we do not make any charge for freight on the invoice because the freight from Pittsburgh to Pittsburgh is zero. We bill it according to the sheet at the price quoted in the sheet, f.o.b. Pittsburgh (1774).

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"Trial Examiner Ballinger: Have you ever made an investigation, taking one year or any period of time, to determine whether you actually paid more out than you benefited from in freight?

"The Witness: We did not take a long period, sir. After this case came up and the question of phantom freight was brought up, I had it checked for a short period, a two-week period, to see how we would come out. It was my own opinion that we just about broke even, and when the check was made it showed such to be the case—about an even break on the proposition.

"Trial Examiner Ballinger: Do you remember what period you took?

"The Witness: It would be a period about the time 2883
that the papers were filed in this suit.

"Mr. Kittelle: The original complaint was filed in December, 1942.

"The Witness: Well, it would be about that period.

"Trial Examiner Ballinger: Shortly after that?

"The Witness: Shortly after that, yes, sir.

"Trial Examiner Ballinger: That is the only inquiry that you made with reference to the matter?

"The Witness: Yes, sir, that is the only inquiry. Usually the difference is very slight. It is a matter of a few cents a hundred pounds as a general rule" (1775, 1776).

Direct examination by Mr. Kittelle resumed.

Our check was on Cleveland Chain and Manufacturing Company. On the Pacific Coast, as I have shown, they would be out of pocket; having to pay the freight to so many different points from the basing points, that, we know, is a loss (1777).

* * * * * *

2885 As to what we have found in our experience with regard to whether buyers of chain are generally well-informed as to prices in the industry or not, in all grades and all types of chain they are well informed. On welded chain they actually receive the mailings of all our competitors and our own, which shows them what the standard price is of the different manufactuers. Then most of them—the hardware jobbers—subscribe to a buying service like R. K. Carter or Oliver Brothers or Biddle Purchasing Agency, who charge them a certain fee per year, and then pass on to the hardware jobber the knowledge of special prices that can be obtained on chain and on various other items on which they are able to make connections and obtain such a price. So when you go into a customer he knows right away what
2886 price he ought to buy a chain at (1783, 1784).

"Mr. Steinhauer: You mean by that the jobber?

"The Witness: The jobber, yes. That is our biggest contact" (1784).

Direct examination by Mr. Kittelle resumed.

As to whether the special prices that the jobber learns about through these buying agencies means cut prices below the published prices, they publish as a general rule in their letter or the catalog that they get out, the standard, the regular market price on chain, and then down below they say "Code, Ohio" or something like that. That may not be the name they use, but "Code, Ohio" might mean that they could give the buyer an extra five per cent on any purchases made of chain. "Code, Arkansas" might mean they could give him ten per cent, and so on. It is a secret code that they use, but that is the system they work under. 2888
They are supposed to be able to save enough on their purchases within the period of a year to more than pay for the information that is given to them (1784, 1785).

It is not true that the buyer who gets that information can get the five per cent or the ten per cent only by dealing through Carter or Oliver or Biddle or whoever sends him that information. One of my first lessons in selling occurred up in Michigan, and I might give this as an illustration. I called on a jobber up there and quoted him a price. I had quite a nice chat with the gentleman, and when I got all through he said, "Are you sure this is the best price that you have?" I said, "Absolutely, that is the best price there is." He turned to the Biddle purchasing book and looked it up and said, "Is there any other company in Cleveland that makes chain besides the Cleveland Chain 2889
and Manufacturing Company?" At that time there wasn't. I said "There is not." "Well, young man," he said, "You're just starting out. I want to give you a tip." And that's how I found out about the workings of the thing. He said, "I can get your chain for five per cent less from the Biddle Purchasing Agency. Just bear that in mind as you go around, and don't be telling your buyers a lie" (1785).

2890 *Louis D. Cull—For Petitioners—Direct.*

Since then I have learned that when you get confidential with a buyer and get his friendship, he'll tell you, and lots of times he'll show you either his last purchase or a quotation from a competitor at a better price. Sometimes he is ethical enough to leave a letter on his desk and intimate that he is going out of the office and won't be back for ten or fifteen minutes, and tell you to just make yourself at home. He doesn't give you the price, but he knows you are going to look at it (1785, 1786).

Buyers have tried to get the five per cent or ten per cent direct, instead of going through Biddle or Carter or Oliver. That has happened many times. We automatically give it
2891 to them when that is in effect (1786).

As to the machinery a man would need to enter into the manufacture of electrically welded chain at the present time, in the first place he would have to have a battery of forming machines, of about four or five different sizes, starting with a little baby one to make small machine chain out of wire, about a little thicker than a heavy hairpin in a woman's hair. The next one would be about the size that would make automobile cross chain. Then, following up from that, one that would make three-eighths inch chain, and finally up to half inch and five-eighths and three-quarter inch. Then you have to have welding machines that will take the formed chain and make it into a finished product. Then you would have to have a battery of twisting machines that would take this straight link chain as it comes from
2892 the welders, grab each link and twist it just the same as those cross chains that we have seen. Then in addition to that you would have to have a large chain tester that would cost you from ten to twenty-five thousand dollars, for testing all the chain (1786, 1787).

You would also have to have your own plating plant for electro-galvanizing and electro-plating the chain, and preferably a hot galvanizing plant, if you sell much material along the Coast, to hot galvanize the chains (1787).

I have about covered it all, except that you would have to have a battery of case hardening furnaces that cost a good many thousand dollars apiece, to case harden all these cross chains that are used in the automobile tire chains. And, finally, some laboratory equipment for testing the hardness, to see that they are tough and have a sufficient amount of case hardness—a sufficient depth—and enough core. And a complete machine shop to constantly repair and tool up this automatic machinery and keep it running—an investment, in round figures, of—even in a modest way—I would say at today's costs, of $750,000 to $1,000,000—very expensive machinery (1787).

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"Mr. Steinhauer: Is that a welded chain shop that you are describing?

"The Witness: A welded chain shop only. For welded chain only" (1787, 1788).

Direct examination by Mr. Kittelle resumed.

If it were weldless you could cut that down (1788).

The weldless chain business would entail the expenditure of—even in a small way—$250,000 to $500,000. Machines that we could duplicate for two thousand dollars when we bought out the Bridgeport plant are now quoted at ten thousand dollars, and it makes a very expensive proposition today to attempt to duplicate or set up a new factory of that type (1791).

2895

In order to manufacture tire chains, a species of welded chain, you would need about 33⅓ percent anyway of the plant that I described as a plant for making commercial welded chain. You would still need those formers and the batteries of welders, the case hardening machines, the twisters, and you could very easily use up three hundred and fifty to four hundred thousand dollars in a factory of

2896

that kind before you bought any material for producing chain (1791, 1792).

We make the machines for making chains—the formers and the welders that I have described, starting at the drawing board. We develop them and build them in our own plant—our own machine shop. They are not for sale on the open market. We design them ourselves. I know that certain commercial manufacturers of machinery make some chain manufacturing machinery that they sell for the purpose, but those of us who are in the business know that it isn't satisfactory. We are experimenting now at one of our plants with three machines for making from three-

2897

eighths to three-quarters inch chain that the Government paid $52,000 to $52,500 for, that we have worked on since last February, and they still have not made commercial chain. That was the product of a large electric welding company that thought they knew how to make chain machinery. They are not satisfactory (1792).

In giving these figures with respect to the cost to get into the chain manufacturing business, I was speaking of machinery alone. Land and buildings are so different in different places that I couldn't hazard a guess as to what that would cost (1793).

Generally speaking these catalogs show that most welded chain is sold per pound. That is, the prices are all based on so much per pound. However, there are some excep-

2898

tions. Bulk truck cross chain and Liberty machine chain, Liberty coil chain, passing link chain, and some of those items are sold by the foot, but that is only a small portion of the business. Generally speaking, all welded chain is sold by the pound. That is the reason that it is sometimes referred to as pound chain. Weldless chain is always sold by the foot except where it is assembled into cow ties and animal tie-outs, porch swing chains, and so on, and then it is sold by the dozen, as a general rule (1793, 1794).

As to why one type came to be sold by the pound and the other by the foot, I presume it came about when they made that small chain and found that it took a hundred feet to make half a pound, they would hesitate to put a price of two dollars per pound on it. It looked a little more reasonable to see it on the invoice at a cent a foot or a hundred feet for a dollar, so it probably came to be sold that way. These customs have been in the industry from the time I first went into it, that is selling welded generally by the pound and weldless by the foot (1794).

As to manufacturers of chain who are not members of the Chain Institute at the present time, The Hodell Company in Cleveland withdrew from membership a number 2900
of years ago, right after the present suit was filed, I believe. The Newhall Chain, Forge and Iron Company, headquarters in New York City, also makes chain, and is not a member. They make pound chain, welded. The Continental Chain Company, they are somewhere in New Jersey—I can't recall just where. They have moved around a lot. A man by the name of Powell is president of it. Chester, Pennsylvania is his headquarters. They make welded chain also. Then there is a concern starting in Dixon or Dixonville, Illinois—the Dixon Chain and Metal Products Company. The are not in the Institute. Johnson Farmer Chain Company at Lebanon, Pennsylvania is not in the Institute. Portland Chain Company, Portland, Oregon, and Pacific Chain and Manufacturing Company, likewise out on the Pacific Coast. Those are about all that 2901
come to my mind at this time. The Cincinnati Pump and Manufacturing Company—they are in the weldless line. They are not in the Institute (1794, 1795).

Holland Furnace Company also makes some weldless and they are not in the Institute (1796).

Examination by Trial Examiner Ballinger.

The Hodell Chain Company is a very substantial company. That company was in the Institute at the time the complaint was filed. The Carroll Chain Company is a good substantial producer. The Cincinnati Pump and Manufacturing Company is a substantial producer of weldless chain. They sell in carload lots, and usually at a very low price, to get rid of the product. They seem to make more money on their pumps than they do on the chain outlet. Newhall Chain, Forge and Iron Company is just a small outfit. The Continental Chain Company is a sore spot all the
2903 time. They buy up a lot of surplus chain, hundreds and hundreds of tons of surplus chain, and put it on the market at ridiculous prices, making substitutions that, in the opinion of our experts, are not warranted and not safe on some of these boats that they equip with chains (1796, 1797).

Lebanon Chain is a family-owned affair—not very large. Fire welded, but still they make quite a little chain. This new one I mentioned, the Dixonville Chain Company—the man operating that was formerly superintendent of the Western Chain Company—a very fine mechanic—and he has got the backing of the town that he has located in. He has been building his own machinery and is starting to be a factor in the business. He will be a considerable factor in the business before very long. He knows the business
2904 from the drafting board up to the top (1797).

Direct examination by Mr. Kittelle resumed.

"Q. Mr. Cull, I have here a copy of Commission's Exhibit No. 374, and I think I will read it into the record so that the Examiner will know what it says and what we are talking about. This is a copy of a letter from George J. Campbell, president of the International Chain and Manufac-

turing Company, to Mr. Reinicker of the John K. Wilson Company, dated September 13, 1937. He says:

'"Dear Mr. Reinicker:

'"I have received word regarding Brown, Rogers Dixon. Cleveland does not know how much freight they saved because the trucks do not come to Cleveland except on special orders from them. They state also they only had one order this way and that was in the Spring. They specified some mountain trucking company and Cleveland had to write them at Louisville, Kentucky when the chain was ready, to come and get it. 2906

'"They also state they did not even know the trucking company—they furnished the routing and made the proposal.

'"Cleveland also states this is the only deal of the kind they knew of since Interstate Commerce Commission governs trucking.

'"The above is in answer to information that John Hunter received, that the one reason Brown, Rogers and Dixon placed the order with Cleveland was on account of the saving of freight by having the tobacco company there haul the stuff from Cleveland at half the freight rate. Personally, I think it was an additional discount, which would be more than the trucking rate. 2907

'"Yours very truly",'

(1797, 1798).

Brown, Rogers and Dixon were one of our customers, hardware jobbers in Winston-Salem, North Carolina. The International Chain and Manufacturing Company evidently were trying to sell them. As to the reference in the letter to delivery of some kind of chain in trucks to Brown,

Rogers, Dixon, there were one or two occasions when Brown, Rogers, Dixon advised us that we should notify either them or this mountain trucking company when the chain they had ordered from us would be ready for shipment, because they were going to have this trucking company pick it up on their way back after delivering a truckload of tobacco into Cleveland, and instead of returning empty they would go back with a load of chain on it. We had nothing to do with it in any way. It didn't make any difference to Cleveland whether they took it out on a truck or whether we shipped it by freight (1798, 1799).

They would buy the usual run of chain down South—
2909 trace chains that they use for plowing—hooking on to the collar of a mule and their plow—and then some weldless chain that they use for tie-outs and things of that sort. It would be both kinds. The trace chain was welded chain. When we sold them welded chain, and this truck pulled up to the door of our plant in Cleveland we would figure the price f.o.b. Cleveland, freight equalized with Pittsburgh. The rate from Pittsburgh to Winston-Salem would be cheaper than from Cleveland to Winston-Salem, and therefore in billing the chain we would allow this Brown, Rogers, Dixon to pick the chain up at Cleveland, pay the trucking company whatever they charged them, and we would allow on the face of the bill about eight cents per hundred pounds to equalize with Pittsburgh. In other words, had it been shipped from Pittsburgh down to Winston-Salem it would
2910 have been—I think I have it. The rate from Pittsburgh is 74 cents. The rate from Cleveland is 81 cents. That is to Winston-Salem. Plus ten percent, which makes eight cents per hundred pounds that we would allow this jobber to equalize with the Pittsburgh rate (1799, 1800).

As to the final result, undoubtedly he could get this tobacco hauler to haul his chain down there for less than the railroad would haul it. Otherwise he couldn't have made

this bargain with them. If the trucker was going back empty he would be glad to take this chain down for practically nothing in order to have a load on the way back, and then we would give the eight cents per hundred pounds toward that freight, whatever it was, and he paid—less, undoubtedly, than the railroad rate (1800, 1801).

Examination by Trial Examiner Ballinger.

The jobber would get the eight cents, because it was shipped from Cleveland; if we had shipped it by rail the rate from Cleveland as of today would be 89 cents per hundred pounds. As to the charging of the Pittsburgh rate, we subtract one from the other, and either add or charge the resulting difference. In this instance it is cheaper from Pittsburgh to Winston-Salem than it is from Cleveland to Winston-Salem. In the final analysis I would say there was phantom freight that the jobber profited by. There was none involved for us, of course (1801). 2912

Direct examination by Mr. Kittelle resumed.

It was the reverse of phantom freight. It cost us eight cents per hundred pounds. We lost instead of making any so-called phantom freight. Let us put it this way. Suppose that we shipped that man this chain by rail in the usual way from Cleveland down to Winston-Salem. He would have paid the railroad 89 cents per hundred pounds, which is the rate from Cleveland to Winston-Salem and we would have allowed him the eight cents. He would have paid the freight from Cleveland to Winston-Salem at 89 cents per hundred pounds, and that would have been a closed transaction, and we would have paid no attention to that in billing, except to equalize the freight with Pittsburgh. The rate from Cleveland is 89 cents per hundred pounds; the rate from Pittsburgh, 81 cents per hundred 2913

pounds. Ten thousand pounds of chain at eight cents per hundred pounds—eight dollars, or whatever it is—eighty dollars. I don't know. That would be subtracted from his bill, subtracted as a credit to him (1802, 1803).

By Mr. Steinhauer.

That would be eighty dollars (1803).

Direct examination by Mr. Kittelle resumed.

When he sent this truck up to get it, we gave him exactly the same allowance of eight cents per hundred pounds as
2915 if we shipped it by rail. But the difference is he didn't have to pay the railroad a charge from Cleveland to Winston-Salem. Instead of that he paid a cheap tobacco truck rate on a back haul for the chain which the man was willing to carry back cheap in his truck. His saving was in the form of any reduction that he got on the freight rate from that tobacco hauler. It happened very infrequently, very seldom that people came to our plant with a truck. Anybody was free to do it. We do not dictate what anyone shall do (1803, 1804).

I had a conversation with Mr. George Campbell, Sr. about this subject as the letter indicates. He called me in regard to the matter. He wanted an explanation. I told him about it. Evidently he didn't believe me, because he
2916 still felt that we chiseled on the discount (1804).

Occasionally we have a customer in a big hurry for chain who comes to our plant by truck and picks up various types of chain. They are all treated alike. As to whether one ever came for weldless chain, there would be no equalization there. Oh, yes, there would be equalization with Cincinnati. The truck would come up there to take this weldless chain down to Winston-Salem, North Carolina. The

rate would be cheaper from Cincinnati to Winston-Salem than from Cleveland to Winston-Salem, and therefore we would have to allow him several cents per hundred pounds on the weldless chain that was in that truck so as to make the freight rate as cheap as if he had bought it in Cincinnati. The situation would be the same as in the case of the welded chain except that we would give him the difference between Cincinnati freight and Cleveland freight instead of the difference between Pittsburgh freight and Cleveland freight. I can't recall any instance of anybody picking up tire chains from our plant in their truck except local instances where the freight would not make any difference (1804, 1805).

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In handling that situation we simply bill them f.o.b. Cleveland, and say nothing about the freight (1805, 1806).

By Mr. Steinhauer.

There would be no freight on a little item like that (1806).

Direct examination by Mr. Kittelle resumed.

They take delivery at our plant (1806).

In ordinary times, prior to the last war and the scarcity of materials, it has been common practice for jobbers or other buyers of chain to get together and work out pool car shipments of chain from our company to them. It has been 2919
common practice for many years. When jobbers do that they benefit in freight charges. They save the difference between the carload and the less than carload rate, and then the one jobber has the cars stopped off, we will say, at Winston-Salem, and there is a small charge that the railroad makes for stopping the car. He pulls out his ten thousand pounds, and then it goes on to some other city, maybe Memphis, we will say, and they take out theirs, and

finally it goes down to New Orleans, and he takes out his, and they all benefit by the carload freight rate (1807).

If we make a shipment of welded chain, the customer, after we get all through with our mathematics on our invoices, has paid our base price plus the freight from Pittsburgh. That is what it boils down to. As to whether we equalize on the basis of a carload rate to Winston Salem or an LCL, we would equalize on the basis of a carload, whatever shipment was made; if it was a carload, it would be equalized on the difference between the carload rate to that point and the same point from Pittsburgh. It becomes a carload shipment (1807, 1808).

2921 On an ordinary LCL shipment, he gets the difference between the LCL rate from Pittsburgh to Winston Salem and from Cleveland to Winston Salem. If the freight from Cleveland down there is more expensive, he gets a credit memorandum. So the end result is that he has paid our base price, plus the LCL rate from Pittsburgh to the destination. If he buys a straight carload all for himself, then he pays our base price plus the carload rate from Pittsburgh (1808, 1809).

When these jobbers buy in pool cars, then the net result, is that they pay our base price plus the carload rate to their destination, plus a small stopover charge for the railroad, although they have succeeded in getting only an LCL shipment which otherwise would cost them more. They get the benefit of a carload rate on an LCL shipment by

2922 pooling their goods with neighboring jobbers, friendly jobbers (1809).

The same thing would be true of weldless chain. We used to sell a carload of tire chains, but nowadays we can't make them fast enough to sell them that way. He pays the railroad the carload rate. What we allow him as a freight allowance has been the subject of controversy sometimes. We allow him the carload rate, just what he has paid, be-

cause our stipulation is that it is FOB Cleveland, full freight allowed to him (1809, 1810).

The buyers have tried to get the LCL allowance, claiming if it was broken up into three or four shipments, it would cost us more and they should save and not the company. As to acceding to those demands, it depended on how hard pressed we were for business. I would say as a general rule the customer is always right. He got it. I have no first hand knowledge of whether or not any of our competitors have done the same thing, that is, allowed an LCL rate when the shipment went by full car (1810).

Not only in the past, but at the present we refrain from selling tire chains in a particular part of the United States 2924
because it is too far away and we have to absorb too much freight. We don't want to sell tire chains down in Texas. There are several distant points in the country where the freight rate is much too high to leave a profit for us. If we have a representative down there, we tell him to "Lay off tire chains in your section, and you don't have the sale of tire chains in your section. That will be a home office or a Chicago office territory on tire chains," and the Chicago office or the home office never pushes it (1810, 1811).

If a good customer on our other products down in Texas sends us an order, such as a hardware jobber that buys a lot of welded chain from us, we will fill his order and take our loss on it, hoping to make it up on his other purchases (1811).

If American Chain and Cable Company has published a 2925
higher price and we are following, we do not date our price list back to the date they went up. We don't as a general rule, because our price list would be so stale by the time it got to the jobber, he would wonder where it had been the other two weeks, so we hit a happy medium in between the date it is actually mailed and the date the American Chain issued their price list. We have no advance warning or advance copy of their prices, so we can't

come out with the price list at the same time, and we don't like to come out too far afterwards with the same date they have. It takes us on tire chains sometimes a month or six weeks to get ours out after we get a copy of theirs (1811, 1812).

By Mr. Steinhauer.

On tire chains it would take us about a month or six weeks. On pound chain and the simpler sheets, we can get them out in about two weeks (1812).

2927 *Direct examination by Mr. Kittelle resumed.*

When American publishes a lower price than they had and we copy that, we follow the same procedure, and in each case, we telegraph our representatives that the market has changed, so that when they go in to a customer, they won't have to act dumb and not know what is going on in the business (1812).

In that instance we date it back in about the same fashion (1813).

Mr. Steinhauer: You date it back to the date of American's?

"A. No, not as a general rule. It will be a few days
2928 after that" (1813).

Direct examination by Mr. Kittelle resumed.

As soon as American has sent out to its customers a price list showing the reduction in price, that automatically becomes our price. The same day we get the price list from them or from our salesmen or any other source, we run through some mimeographed sheets and air mail them

to the Pacific Coast, to the Atlantic Coast and give them to our billing department and we start billing immediately as of the new prices, whether it is up or down (1813).

Regardless of what date our price list may bear, we start selling the customers at the new price as soon as we learn of American's change whether it is up or down, as quickly as we can put the machinery in motion (1813).

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"Q. Mr. Brisbin's letter of December 1, 1939, to the various men whose names I read—that is Commission's Exhibit 175—makes the statement that he was not interested in accepting the office of President of the Institute to which he had been elected until the members—and I am quoting 2930
'reduce to writing some definite program that they individually would subscribe to and maintain.' That is the end of the quote.

"Will you state whether or not any program was reduced to writing? A. There was no program reduced to writing or proposed, to my knowledge" (1818).

There was no verbal or other program established at that time. At that particular period, as I recall it, we were going through the throes of the worst competition that I had ever experienced in the chain business. I believe it was that year that our company lost money, or else it was such a borderline case that there was no fun in it (1818).

Mr. Brisbin accepted the presidency. This price cutting did not stop at that time. The thing that stopped the price 2931
cutting was the war that started in 1939. War was declared, I gues, in September, 1939, and got under full way about a year or so later when England commenced ordering a lot of chains and various countries started preparing in a big way, and all of us became suddenly busy. As fast as we got busy and didn't need the orders, the price cutting stopped. That was about 1941, I would say (1818, 1819).

* * * * * *

The Noland Company, referred to in Commission's Exhibit 289, sells plumbing supplies and mill supplies and so on, largely to the Government. They are located in Washington, and I believe they have two or three other houses, maybe one in Roanoke, and two or three places in the south. They are jobbers. We have sold Noland for a number of years. Noland has put in bids to the Procurement Division of the Treasury to furnish our tire chains (1819, 1820).

"Q. Now, this letter, at the end of the last paragraph, which Mr. Shirley is writing to the Hodell Chain Company, says:

2933 'I might further say that I question very much whether I can have the thing readvertised, but I do wish that you would get in touch with the Cleveland people. If you think you can get them to do so, ask them to insist on Noland withdrawing his bid, which the Treasury might possibly permit him to do.'

Did Mr. Olmstead or anyone from Hodell Chain Company ever get in touch with you about that? A. No, and if he did, I wouldn't be that dumb. If we had a lower bid in with the Treasury Department or Procurement Department, we would naturally stick to that bid and get the business.

"Q. Did you ever ask Noland to withdraw any bid? A. We did not.

2934 "Q. Do you know whether Noland ever did withdraw this bid? A. I am sure he did not.

* * * * * * *

"Trial Examiner Ballinger: Did Noland submit bids to the Treasury Department?

"A. In their own name, and state they furnish Cleveland Chain products.

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"Trial Examiner Ballinger: Did Noland submit that?

"The Witness: Noland submitted it. We had no connection with Shirley, Olcott.

"Mr. Schrimsher: You submitted some directly, did you not?

"The Witness: We did on some occasions submit some direct, but generally through Noland. This is a dumb piece of letter writing, to expect a competitor to withdraw a price so that he could go in and get the business for someone else. It doesn't make sense" (1820, 1821, 1822).

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As to my earlier testimony that sometimes we follow the prices of American Chain and Cable Company and sometimes those of McKay, I think I qualified the statement I made about following McKay's by saying occasionally that they put out a price list first, but generally it was the American prices that we followed, and that is what I want read into the record. Most of the time it was American (1822).

Examination by Trial Examiner Ballinger.

Occasionally we did follow McKay. When McKay's price came out, if it was lower, we would follow it. If McKay's came out first, and then American came out at a different price, we would follow the American price sheet, because they are the leaders in the line. They are the biggest people and we would follow their price (1822, 1823).

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Direct examination by Mr. Kittelle resumed.

I can't recall that it ever happened that American came out with one price and McKay another (1823).

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2938 *Louis D. Cull—For Petitioners—Direct.*

Direct examination by Mr. Duncan.

In 1921 when the Weed patents ran out and we were free to go into general competition with the American Chain Company our plant had, I would say, about half the employees they have now, or less than half. During this time we have increased the number of our employees at least twice (1832, 1833).

The size of our plant has increased since 1921. We have built buildings, building after building, and enlarged right along. We completed a good sized division or addition within the past year. The volume of our business in tire
2939 chains has increased very much since 1921 (1833).

"Mr. Steinhauer: How much?

"*By Mr. Duncan.*

"Q. I am now speaking— A. (Interposing) I would say at least 500 per cent.

"Mr. Steinhauer: Starting out from what figure?

"The Witness: A very small figure in '21, because we were selling the split chain that didn't meet with such good consumer acceptance, so that we had to start in and build up from there to the present big quantity that we sell of those chains" (1833, 1834).

2940 *Direct examination by Mr. Duncan resumed.*

We had our plans pretty well laid to go into the regular tire chain business the minute the patent ran out. We had had previous experience in making tire chains and we did go in (1834).

* * * * * *

In 1935 we had our relative position in the trade given us by 1936 by the Institute—our percentage of the total volume. That percentage has increased considerably since that time (1835).

After 1935, after the NRA ran out, our plant has increased in capacity with regard to tire chains and also welded chains of every type we make. The number of employees has increased likewise since 1936. The volume of our business is many times larger than it was in 1936. I testified that our relative proportion of the total business in tire chains has increased since 1936. I don't have those figures, but I know our position is relatively better than it was in '36. During the period 1935 to 1941 we went 2942
through periods of hard times as far as profits were concerned in the chain business. We got to the point where even we couldn't make money on some occasions (1837, 1838).

There was one year during that period when we lost money. Prior to the 1930's we always made some money in the chain business (1838).

As a business man I state that there was the keenest kind of competition between ourselves and our competitors in the sale of tire chains during the period from 1921 to 1940. We had any number of manufacturers fighting for the same business, the Western Chain Company, Peerless, International, Hodell, McKay, and of course, American didn't fight so much for the class of business we were after. They had advertised chains. They were well established, 2943
and they sort of stood aloof and let the rest of us fight it out, except that when it got pretty bad, they brought out what they called the Rid-O-Skid at a terribly low price, and that kind of set us all back, but the competition was extremely hard and keen (1838, 1839).

The companies were fighting each other with discounts and extra terms (1839).

2944

As to whether their prices to the consumer were different from our prices to the consumer during that time, we didn't make the prices to the consumer. It was the jobber and the retailer that made the money. The chain manufacturer just lost the money. The market price went as low as 60 and four 10's off the list (1839, 1841).

Cross-examination by Mr. Steinhauer.

"Q. Mr. Cull, yesterday I asked you, 'Do I understand that Round makes no chain at all now?' and you answered that was right—makes no chain. A. Now, wait a minute.

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* * * * * * *

"Mr. Kittelle: Will you identify which Round you are talking about? There is a Round California Chain Company and a David Round.

"Mr. Steinhauer: I meant the Round California Chain Company.

"The Witness: Well, then, they do make chain—plenty of it, out there. I thought you referred to David Round and Son, associated with us in Cleveland, in our offices and in the same plant" (1847, 1848).

* * * * * * *

Cross-examination by Mr. Steinhauer resumed.

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As to whether I ever heard any discussion of the pricing system since the NRA days, that is a broad question. The basing system was never discussed. The basing price system means the same to me. Basing price could possibly mean the price that applied in the various articles and the basing point system would mean the method. The basing point system was not discussed even in the NRA days, except when a new competitor would come in he would be shown the basing points that were on the other fellow's price list, and to that extent he would be educated, but there was no discussion (1849).

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"Q. There must have been discussion when you made that part of your system under NRA, wasn't there, when you came to the conclusion that you should continue that system? A. It wasn't made a part of it. It was just carried on. It wasn't formed there. It was just an inheritance from the previous customs.

"Q. So you don't find it necessary to do anything about the system in the way of discussion from year to year now? It just runs by itself? A. It runs on by itself. Nobody knows any better way or different way of doing it.

"Q. Well, a different way may not be better, in your judgment? I am speaking about f.o.b. factory prices. A. All I can say about that is that we would go out of business soon. We would soon go out of business if it were done on a different basis" (1849, 1850).

2948

As to the effect of volume upon costs, you can go out of business in a year if you don't have enough volume or enough cash to support the deficit you make in that year (1850).

I spoke about the amount of money it would cost to put in these various plants for welded chain, weldless chain and tire chain. It is not possible for these plants to start out just as we did with scarcely any capital and grow under this pricing system we have. When we started out we bought some second hand forming machines at four hundred dollars apiece and converted them into hook forming machines. Not long ago I inquired for a new forming machine in Bridgeport, Connecticut, where they are made, and they wanted over ten thousand dollars for the very same machine that we had bought for four hundred dollars, and in addition to that the delivery was about two years. It is true that has to do with the present advanced prices of everything (1850, 1851).

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It is in line with the present advanced prices of everything. But you will never get back to the point where you can buy that machinery the way we bought it, and have

it billed at that price. Your labor scale will always be this high or perhaps a bit higher. I agree that we will be going down again some day, but they never go quite to the bottom again. They are always a step above. Now we can make our price f.o.b. our plant and compete with the plant next door to us. We could make it f.o.b. the plant and compete with the Hodell Chain Company, if the Hodell Chain Company did the same thing (1851).

"Q. Yes. Now, if it happened to be a very small plant and you had a large plant, you could probably go right up to their plant because their volume would be so small? A. I didn't get that.

2951 "Q. I say if they had a small plant and you had a large plant, you could probably go right into their plant—their territory—if they are next door to you, in the next door to you, in the next door area?

"Mr. Kittelle: Do you understand the question?

"The Witness: No, I do not. I could probably go right into their plant, you say?

"*By Mr. Steinhauer.*

"Q. That is, your territory would be much nearer the factory than it would be in the case of a competitor as large as you are?

"A. Well, I am not worried at all about the Hodell Chain
2952 Company. What I am worried about is the volume in the territory" (1851, 1852).

The volume isn't there in the first place for one good sized company, and when you aggravate that situation with two good sized companies you are just that much worse out of luck. That's all. As to our territory and the costs of the other plant, I thought in my previous testimony I developed the fact that the cost in each of these plants was practically the same due to the fact that they had the same machinery,

and one had no advantage over the other insofar as I have ever been able to find out in my talks with the different managers of these plants. The costs of the different plants do not vary, one from the other on test questioning that I have done. Naturally when you meet a competitor and you go out for an evening with him, you will bring up the question of cost once in a while on an item that you think is low, and you want to find out how he is doing it and whether he is making it any lower than you. And any spot checks that I have made have indicated his cost to be about the same as mine; whether he was lying to me or not, I don't know. I would assume he was telling me the truth and wasn't bluffing too much (1852, 1853).

2954 The costs of the different plants vary from time to time due to the volume of business in one as compared to the other. But the volume goes up and down in each plant approximately the same as in the others. While the volume of each plant is not the same the personnel in each plant are laid off or hired in accordance with the volume that is going through (1853).

Your wages are less when you have less work going through. To compensate, your taxes, your superintendents and your fixed overhead, of course, do not vary much, and that is why you don't make any money in those years. That is the time when you dip into your surplus, if you have any (1854).

"Q. Of course your overhead varies with volume, and all of your plants are not of equal size. That is true, is it not?" 2955

"Mr. Kittelle: You have two questions there, Mr. Steinhauer.

"Mr. Steinhauer: Well, I just asked him—

"The Witness: First, your overhead varies with volume?

"Mr. Steinhauer: That's right.

"The Witness: Naturally, if you are doing a million dollars worth of business a year it takes more clerks and more foremen to handle the men that will produce that than would be true in the case of a smaller plant that turns out two hundred thousand dollars worth of business a year, where one working foreman perhaps can handle the whole thing.

"Mr. Steinhauer: That's right.

"The Witness: Now, the second part of your question was ——" (1853).

I wouldn't attempt to say that our costs are the same as all our competitors. As to what I meant by my state- 2957 ment that under this present system which we use we are competitive, I mean that we have to fight for every dollar's worth of business we get. We either have to give the man a better product, better service, or sell ourselves personally to him and get his business through friendship. Sure, we are competitive (1853).

We would not be competitive at all under an f.o.b. factory price basis, provided we stuck strictly to an f.o.b. factory basis, because by the time we got down here to New York, where there is a nice volume of business, the freight rate from Cleveland would be about fifty cents a hundred pounds, and add that on to, say, ten dollars a hundred pounds for the chain would make it ten fifty in New York. Our friends down in York would start, we'll 2958 say, with the same ten dollars per hundred pounds, and the freight from York to New York is about twenty-five cents a hundred pounds, so their price would be ten twenty-five to the jobber in New York. Our price from Cleveland would be ten fifty. And we don't use any hypotism in this business in order to get orders. The man at the other end knows what he is doing, and he won't pay the price. As far as competing with our competitor between our two areas, I wouldn't say there would be any competition in it

at all when you run into a situation like that. He takes the business away from you and you lay down and have no chance to fight him (1855, 1856).

We couldn't very well take it away from him if he does that, under f.o.b. factory basis, except in those territories that were close by our plant. As I explained before, we are hemmed in by the American Chain and Cable Company's and the McKay Company's plant in Pittsburgh, approximately 125 miles from Cleveland; Carroll Chain Company, about 140 miles south of us; Hodell Chain Company right in Cleveland, fighting for the same business, incidentally; Columbus McKinnon Chain Corporation in Tonawanda, roughly 180 miles or so east of us; and again the two chain factories in Chicago in the Chicago area—the Taylor Chain Company and Western Chain Products Company (1856, 1857). 2960

Now, draw a little circle and see what is left for us. There aren't any big chain buyers in the territory left for us (1857).

"Q. Yes, but I am talking about just when you go right outside of your territory to somebody else's, you compete pretty keenly with him somewhere along the line there, do you not? A. I fail to see where there would be any big chain buyers in this devil strip, so to speak—the meeting of the two territories, our territory and these other chain factories. And the minute we would get on the other side into his territory there would be an advantage of a few cents a hundred pounds in his favor, which would be enough to throw the business in his direction" (1857). 2961

Unless we were allowed to meet his price in that area we couldn't sell there, and the minute we do that we establish a multiple basing point area, which I understand to be part of this complaint also. So I don't know how business could be done under your theory. It is a multiple basing point system that we have now and I can do business under that system (1857, 1858).

"Q. In other words, if you can all have the same delivered price everywhere, you can do business—compete. Is that your idea? A. I don't care whether it is the same delivered price or not. All I want is the same method.

"Q. Well, the same method produces the same price, does it not? A. Not necessarily.

"Q. It has here, has it not? A. The only reason it has produced the same price for quite a few years, or approximately so, is because of the big demand for chain that has existed, and the shortage of steel. In fact there is such a big demand that you can go out and sell chain today at a premium in some cases, but that condition does not ordi-
2963 narily prevail, and it is normal times that I am thinking about" (1858).

* * * * * *

I did not testify yesterday that the Western Chain Products Company made welded chain which it sells f.o.b. Chicago. I testified that they made weldless chain which they sold f.o.b. Chicago. Peerless Chain makes weldless chain which they sell f.o.b. Winona, Minnesota. That is the Tenso brown type—just a wire chain (1859).

It is unpatented. It is identically the same chain from that everybody else makes. They sell it on a different basis than the others do, but their competition is not felt because at this moment we are about a year behind on deliveries, so that if they sold f.o.b. Cleveland they still could not get all the business under the abnormal conditions that
2964 exist today (1859, 1860).

As to how long they have been selling that way, it has been only recently that I heard about it. I don't know how long. I am not in a position to say. They have not made it too long. Price is not a factor today in getting business. It is delivery that counts. I do not know for how long a period they have been doing this (1860).

They have not bothered us by doing it because we have had so much business we wouldn't meet it or care today

2965

anyway. We probably will meet it just as quickly as our order pile goes down and we want business from St. Paul, Minneapolis, and Duluth, and the territories that are up that way (1861).

I testified several times that we are free to change our mind as to our pricing method. As to why we should change that with the advantages we enjoy under the present method, the only advantages we enjoy under it is that we know the basing points that are used. I don't know that we enjoy any too much advantage aside from that—being able to compete all over the United States and knowing that we can meet the freight situation, whether the chain is made in Trenton or York or wherever it may be. It just gives us a little better knowledge of market conditions (1861). 2966

As to whether we care whether it is f.o.b. factory, I don't care whether it is f.o.b. Johnstown, Pennsylvania, f.o.b. Atlanta, Georgia, or where it is, so long as I know where it is. But I don't want it f.o.b. Cleveland unless all the other fellows make their prices f.o.b. Cleveland. I want to be on a fair and equal footing so I can do business. That is all I am interested in. Our pricing system is agreeable and satisfactory. It is the only way that I know of that chain could be sold on a fair basis and on a satisfactory basis, unless it is put on a multiple basing point. Give me an opportunity to sell equalized with my competitors anywhere they make chain, and I will do it that way (1861, 1862).

But it will probably increase the price of chain (1862). 2967

Examination by Trial Examiner Ballinger.

We used the multiple basing point on one kind of chain—the weldless. And that causes us a great deal of extra expense on an invoice. We have to equalize, first, with Pittsburgh on welded chain, and then we equalize with, maybe, Cincinnati on something, and then on a third item we

2968 *Louis D. Cull—For Petitioners—Cross.*

equalize with York. And if you are going to add some more complications like that, we are going to increase our clerks, and that will go on the price of chain, of course. It won't reduce the price. We have at least four basing points, I would say, outside of Holland, Michigan. As to these basing points, we have Bridgeport, Connecticut; York, Pennsylvania; Cincinnati, Ohio on part of the line; Cleveland and Holland, Michigan (1862, 1863).

As to a basing point on the Pacific Coast, we do make prices, as I testified, f.o.b. San Francisco, f.o.b. Los Angeles, f.o.b. Seattle, Portland, and all along the Coast. We make these Coast cities basing points in effect by adding on $1.70,
2969 the carload rate from the East, either from Cleveland or Pittsburgh, and that establishes those as basing points, we'll say for the West Coast (1863).

Cross-examination by Mr. Steinhauer resumed.

As to comparison of our charges on our products on the Pacific Coast points from Seattle Chain and Manufacturing Company and Round California Chain Company with the prices of our competitors delivered there, if they want any business out there they have to meet the situation. They have to come through with the same prices. We have the advantage in some places. Take, for instance, Salt Lake City. That is not on the Coast, but it cheaper for the man in Salt Lake City to buy chain from San Francisco than it
2970 is to get it from Cleveland, and yet it goes out to the Coast and back. That is because when it gets out to the Coast it travels out there carload, and then when it is trucked back to Salt Lake City from San Francisco at about a dollar per hundred pounds, the addition of the two makes a better price—a lower price—than the l.c.l. price would from either Cleveland or Pittsburgh or Chicago or any of those points (1863, 1864).

That is on welded chain or weldless. Tire chains are delivered (1864).

Examination by Trial Examiner Ballinger.

L.c.l. means less than carload; "c.l." means carload. They are usually referred to that way (1864).

Cross-examination by Mr. Steinhauer resumed.

When these competitors go out to the Pacific Coast on welded and weldless they meet our prices. That is virtually another basing point out there (1865).

When American Chain and Cable Company gets out its new price list with higher prices, sometimes we make a change. I have known them to put in a lower price on some item or items than we want to sell for, and if it is an item 2972
that we are buying outside and one that they make themselves, like drop forged cold shuts, or something of that kind, we have been known to not follow their price but to put in a higher price and scare off business that is unprofitable. But in the main we do follow their prices. We copy their lists. Those articles that I have talked about are not more specialized. They are not made to special order but they are attachments and they are not fundamentals. A drop forger can make them, and some do (1865).

I don't believe our Bridgeport plant have the Climax for getting rates. I am not positive about that though. I am inclined to think the they might have that for the Pittsburgh rates. Climax takes care of the weldless rates also (1865, 1866). 2973

As to when Cleveland adopted the present pricing system on weldless, the present pricing system embraces York, Pennsylvania, and that was adopted in 1928, when we took over the Bridgeport plant. And when the American Chain and Cable Company moved their weldless department from Bridgeport, Connecticut down to York, Pennsylvania, to combine it with their plant down there, that is when we adopted that system (1866).

2974 *Louis D. Coll—For Petitioners—Cross.*

We did not have any talks with those people at the time we adopted the system. As to whether it was or was not necessary, we saw one of their price sheets, no doubt, and we were already making a price f.o.b. Cleveland to meet Hodell's situation. When they moved out of Bridgeport down to York we had to meet the York situation. And when they were in Bridgeport we did not have to bother with their Bridgeport production at all because we were neck and neck with them then. Then when they stepped further down South we had to equalize in order to get business (1866, 1867).

As to whether they would equalize with us outside of
2975 their territory, there was no change when they moved to York as far as they were concerned except that it put them a little nearer the larger markets. Cleveland would have to have the same price at York that American had. If our price sheet was the same as theirs at the time—and I assume it was, our price would be f.o.b. Cleveland, freight allowed to York. As to whether we both put in price lists on that basis at that time, we would follow them when their price sheet was issued. Naturally, it is a law of business that you have to meet your competition. We would follow their lead (1867, 1868).

We have to do that, going up in prices as well as down, because I think that if you check the prices on file you will find that price increases in the business are as a result of
2976 increased cost of steel. If steel goes up five or ten dollars a ton, we are not miracle men—we can't absorb it. We have to go up and they have to go up. We go up approximately together. If for some reason or other they don't want to go up right away—have a big stock and want to tire somebody else and discourage them—we will string along and the rest of the industry will string along until they get ready to call it quits and put their prices up (1868).

As to whether we all go up together, then we are naturally glad to get relief, and go up. As to whether testimony to

the effect that we all have gone up together conforms with my knowledge, I would say that anybody who did not go up with their price at the time would be silly—they couldn't stay in business—because their costs would advance the same as the costs of American Chain would advance (1868, 1869).

As to whether they all advance together and advance by the same amount all the time, the steel prices have been the same all over these United States for a great many years, and when steel goes up ten dollars a ton in one place it likewise goes up ten dollars a ton in another. I have testified before as to how the costs of making chain at our plant compare with those at all our competitors' plants. As to 2978
whether our costs are the same as those of our competitors, I said yesterday that we had a very poor cost system. We can make spot tests of costs (1869, 1870).

I said that basically the machinery was all alike, that our production on that machinery would not vary much from what the McKay Company, American Chain and Cable Company, Taylor Chain Company, or Western Chain Products Company got out of those same machines (1870).

I know our wage rates are the same or about the same because we discuss labor matters and exchange information on wage rates in our Institute meetings, so I know all these basic facts are the same, and once in a while, as I said, I will talk to my friend, Frank Bond, and say "What is a 7S2 trace costing you now?" and he will get a pencil and do some rapid figuring and tell me a price. And I will nod 2979
my head after doing a little figuring and say, "Well, that's about the same as ours is." So I never saw their costs, but just from conversations I have had with different people and my own basic knowledge of the industry, I come to that conclusion, which I think is the same one (1870).

I would say that they are all ranged fairly within a narrow range. If we are losing money at a certain price you may be sure American chain is losing at the same time.

There is quite a difference in the overhead of different plants because of volume and one thing and another and advertising (1870, 1871).

Frequently with American Chain and Cable Company's increased overhead they can do things that we don't think of and don't do in Cleveland. They may put in an overhead system for transporting barrels, and so on, which we push around by manpower. What we save on advertising and on the cost system will go into some of these things that we are not quite up to date on, as is American Chain, but it washes out in the long run. It is true that there is some difference in the operating costs of the different competi-
2981 tors. There are different factors because at the end of the year the profits wouldn't all be uniform. They never are in businesses. It depends on the volume and the efficiency of operation (1871).

As to whether the prices of Carroll Chain Company are the same as the prices charged by members of the Chain Institute, I glanced quickly through that price list they mailed me the other day, which was put on the record here, and in the main they copied the American Chain and Cable Company or Cleveland Chain and Manufacturing Company, or some other price list, and they were substantially the same. On the f.o.b. Pittsburgh basis likewise (1871, 1872).

* * * * * *

Mr. Merriman was not selected by the Institute mem-
2982 bers to stabilize prices. * * * If Mr. Merriman was hired for that purpose it would come as an indirect result and not as a direct result of his employment. If Mr. Merriman could preach the gospel of good business to us, as he did on many occasions, and instill the spirit of brotherly love into us instead of getting around at each other's throats with a knife, yes. But we didn't hire him to set the prices.

"Q. No, no, no. A. And to raise prices, or anything of the sort.

"Q. Not at all. A. He was hired to head the Institute. That is what he was hired for.

"Q. By stabilizing prices I do not mean to name the prices or have any authority over them. A. No, sir. I dispute that. He was not hired to stabilize prices.

> "Trial Examiner Ballinger: Stabilization of prices is a general term and it might include many factors. If you want to go into that I think you ought to deal with the particular factors that enter into it.
>
> "The Witness: Well, off the record I can agree with him to the extent that you have now stated—it is a general term. But I don't want to be led into a trap by saying he was hired to stabilize prices when I know darn well that he wasn't hired for that purpose" (1879). 2984

He had nothing to do with prices. He has called me up about a price. When we got down into the depths of despondency and dragged so low that none of them could walk, the closed transaction issue was brought up, and Mr. Merriman either volunteered or was asked if he couldn't run down some of this stuff and see whether the jobbers were lying to us or whether they were telling the truth. He was hired for that purpose (1879, 1880).

As to whether it was one of his functions, automatically it evolved upon him as confidential man. I couldn't very well call up George Boucher and say to him, "One of your 2985
customers—" and mention the customer's name "—in New York says he got a price from you on tire chains of fifty and three tens. Is that so?" You just couldn't very well do that. George would kind of hem and haw and maybe he would admit it or maybe in a way he would deny it, and then later he would go to that fellow in New York and say, "You're a swell friend to tell Cull what I did for you. I'll never give you another price." So that was the

sort of function Mr. Merriman took on. It didn't last very long (1880, 1881).

"Q. Why is it that there is not so much price cutting today as there was? A. Because basic conditions have changed.

"Trial Examiner Ballinger: That condition existed only during the depression?

"The Witness: Only during the depression, yes" (1881).

* * * * * *

Cross-examination by Mr. Steinhauer resumed.

2987 "Q. How much do you estimate the producers who were named yesterday as not being members of the Chain Institute produce in the way of chain as compared with the members of the Chain Institute?

"Mr. Kittelle: Do you have reference to all types of chain or——

"Mr. Steinhauer: I am speaking of all types of chain, yes.

"The Witness: Well, my best guess—and you understand it would only be a guess—is that it would be about fifteen per cent" (1881, 1882).

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Cross-examination by Mr. Schrimsher.

2988

I testified that Western Chain and Peerless Chain companies manufactured certain types of weldless chain. They are not equalization points under our system of selling weldless chain. As to why we didn't equalize before the war with them, we didn't know they were making it before the war. We didn't know that Holland, Michigan—company, was producing a small item of furnace chain. As to using that as a basing point, we used that and copied people's

basing points that did know it. I did not know that furnace chain was being produced in Holland, Michigan. It is a small item with us, a very small item. I still think it is a mistake to equalize with Holland, Michigan (1887).

I knew that pump chain was being manufactured in Cincinnati. It is a much bigger proposition than the furnace chain item in the weldless chain line. I don't know what Peerless produces nor what Western produces. The only thing I know is that they make the Tenso chain there. I don't think they have gone into it in a big way. I consider Tenso chain of equal or better importance than pump chain and the weldless chain (1887, 1888).

I would be a poor business man if I equalized freight with 2990
either Chicago or Winona, Minnesota in the sale of weldless chain under today's market conditions. Before the war they didn't make any, to my knowledge. We have never equalized with those two plants (1888).

I testified that American would bring out an increase in price because of the increase in the cost of raw material, namely, the steel. We and other competitors of American waited until they brought out such a price. It is theoretical that if American had a sizeable supply of steel on hand, they might take their time about coming out with a higher price. In such a case, we just wait until they come out with the price list (1888, 1889).

It could have happened, and very likely did, that when the price of steel has gone up we had a sizeable supply on hand that would enable us to sell at the old cost until that 2991
supply ran out and we were forced to buy steel at the higher price. But at the same time we are often caught the other way with a big stock at the high price when the market goes down, so we have to use the profits on one hand to reduce the losses on the other hand. That equalizes the situation (1889).

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Redirect examination by Mr. Kittelle.

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As to how long Peerless has actually been manufacturing weldless chain instead of buying it from somebody else and reselling it, it has been just recently that we heard about it. I couldn't set a date on that. It was during the war period, though. I think Western has been making weldless chain instead of buying it from somebody else and reselling it about the same time, just within the last couple of years, I would say. Incidentally, I think they are both in it only in a limited way (1891).

As to whether prior to the war either Western or Peerless
2993 were quoting FOB Chicago and Winona, respectively, I am sure they wouldn't quote FOB Chicago or Winona and purchase the chain from any other manufacturer (1891, 1892).

I testified on cross-examination that I might have one invoice and would equalize with Pittsburgh and also equalize with Cincinnati and also equalize with York, all on that same invoice. We would not equalize on the same item with three places. It would be three different items in the same shipment, a shipment of welded chain would be freight equalized with Pittsburgh; a shipment of weldless chain, sash chain, would be equalized with York, Pennsylvania, if it went down along the Atlantic Coast (1892).

By Mr. Steinhauer.

2994

I mean the nearest factory. A shipment of pump chain included in the same bill of lading would be equalized with Cincinnati, Cincinnati being nearer to the south and taking a lower rate (1892).

Redirect examination by Mr. Kittelle resumed.

I testified about a customer in Salt Lake City—that if he wanted to buy less than a carload, it was cheaper for him to buy it from San Francisco than it was for him to buy it from Cleveland or the east (1892, 1893).

"Q. Because the full carload went out there at a cheaper rate, and then a less than carload coming from San Francisco would carry a smaller rate. If a Salt Lake City customer wanted to buy a full carload, I take it, then, that would be cheaper for him to get it from the east. Am I right, than to get it from San Francisco in that case? A. You are wrong. Oh, it would be cheaper to get it from 2996
the east than it would from San Francisco.

"Q. A full car? A. At the time of the low water rates he could get it on a very cheap basis from San Francisco. I don't have those figures with me, but the chances are it would be about the same on a carload by the time the San Francisco plant paid the trucking or the carload back into the mountains from San Francisco to Salt Lake. The advantage would be in LCL shipments, and practically all the shipments there are LCL shipments into Salt Lake City (1893).

We could sell to the Salt Lake City customer who wanted to buy a full carload directly from Cleveland instead of going out to the coast and back (1893).

I have found that the carload rate of freight from Cleve- 2997
land to Salt Lake City is the same as the carload rate of freight from Cleveland to San Francisco (1894).

There are about 12 or 14 basing points on the Pacific Coast. All the ports out there are our basing points, and all at the same price. I was asked on cross-examination when Cleveland had adopted the present system or method of selling weldless chain and I answered that since the present method involved the York basing point that it had been adopted by Cleveland in 1928, approximately (1894).

Prior to the time American moved its plant to Yo
Cleveland was not making very much weldless chain. Wh
we were making we were equalizing with Bridgeport, a
Cleveland, of course, was a basing point already, becau
the Chain Products, or Hodell Chain Company, had alrea
been established in making it there, so we equalized wi
Bridgeport and Cleveland, naturally (1894, 1895).

The Hodell Chain Company was originally known
Cleveland Galvanizing Works, then Chain Products, a
finally Hodell Chain Company (1895).

All the prices did not go up at the same instant of ti
when American issued a new price list. They didn't
2999 go up at the same time, unless you would call within
weeks or so the same time. About that much time wou
elapse from the time the first came straggling in until
received the end man's prices. I did testify that wh
we heard or learned of American's increase, we did try
get that into effect through mimeographed circulars
other means without waiting for the time it took us
get our formal price lists out (1895).

There was a time lag between the time American ca
out and the time we put ours into effect. I testified th
it would take about two weeks to get a price sheet o
There would be a few days between the time they put the
price out and we heard of it and then tell our salesm
that was our price now (1895, 1896).

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3000 *Redirect examination by Mr. Duncan.*

I testified regarding competition in prices and our acti
competition in the matter of service and in quality. The
are also other kinds of competition in the chain industry
competition in packaging, in the kind of materials th
are used in the different products. We are continual
experimenting to obtain steel that will case harden hard

on the outside and leave a nice core on the inside and wear better in tire chains; searching for different alloys to use in chain that will make them lighter for the workmen to handle in lifting them onto a crane or carry them around, and various quality items of that sort, and then establishing plants like we do to give service and convenience to our customers, and engineering advice along that line too (1898, 1899).

In the matter of service, we have met the competition between other manufacturers in servicing their tire chains. That is a sore spot the way they go out and put in warehouse stocks with jobbers, with public warehouses and in their own warehouses and have them ready to put out in a blizzard or any time there is a big demand for the chain and the same thing applies to a lesser extent on coil chain. The American Chain has warehouses on the Pacific Coast and other points for servicing (1899). 3002

As to the frequency or continuity of that kind of competition in servicing in the chain business, everyone has been on their toes for a good many years. As long as I can remember, they have been right after the business, each individual company trying to outdo the other one in service, in appearance and in the quality of their product. All of that has a direct effect upon the customers that they obtain (1899).

As to competition in quality, our union is always trying to say we can sell our product for a higher price and pay them higher wages because ours is the finest quality on the market, but I argue that they are all wrong on that. We do make the best quality, but we can't get more for it than American Chain or anybody else (1899, 1900). 3003

Our competitors put out different forms of chain, tire chains, that they claim to be improvements on their other forms. As to the prevalence of that through the chain industry in relation to tire chains, some years ago the American Chain Company was the only one that put out

a reinforced chain, a lug chain. McKay came along soon afterwards and gave them a run for their money with their Multi-Grip reinforced chain. Some years later Campbell came along with one that I think maybe at least is as good as the American Chain and maybe a little bit better, and continues to give you a big run for your money on the reinforced chain business. Then, of course, Peerless came out with one, and we naturally had to do something along that line or we would be left by the wayside, so that real spirited competition in design and quality and service existed (1900).

As to the increase in the number of our competitors in the period that I have been connected with this industry, 3005 when I first knew the chain business, which is a good many years ago, more than I ought to admit to, the Western Chain Company purchased their cross chains from the Krein Chain Company which we own. They bought them in carload lots, and they had no thought of making their own chain, but before too many years went by, they started developing their own machinery and they are now a good sized factor in the chain business. Taylor's plant was a small plant. He had fire weld chain makers there, the old-fashioned blacksmith type, and it wasn't too long before Taylor started in making electric welded chain and building up (1900, 1901).

As a manufacturer, Cleveland came into the electric weld business in 1924 and Western too. Western took our assist- 3006 ant superintendent two or three years later, and he took with him plans and blueprints for our machinery, and some he had in his head, of course. He was a good man, anyway. And he started them in the electric weld business. Later on, Peerless—I would say in the late 20's or early 30's, came in. Previous to that they had been buying chain assemblers. Taylor and Nixdorff-Krein, I believe, kind of pooled interests and worked together in developing machinery, but along in the early 30's they went into the bus-

ness, and both have expanded, all at the expense of the American Chain Company, too, who were the biggest factors in the business (1901, 1902).

I testified that Western took our superintendent or foreman into their employ and learned how to make certain types of chain that way. As to whether there has been any competition in borrowing employees of manufacturers during this period, we took a couple from the American Chain Company when we started up, and now the one that I referred to that went from us to Western has gone to Dixonville, Illinois to start his own factory, so there is plenty of competition in this game (1902).

As to the taking by the McKay Company of all the foremen of the American Chain Company when they moved to 3008
York, I know about that incident. We were invited to join in the conspiracy to start a new electric weld plant and I knew they were going to get some top men from the American Chain in York, and that is why they adopted York as their headquarters (1902, 1903).

Every time a new manufacturer seeks to sell its goods in the territory you have been occupying before, competition has increased in that territory very much. As to whether there has been that kind of increase of competition in territories that we have been selling in during the period that we have been engaged in the chain business, we have never found anything but competition in the chain business (1903).

We have gone into other people's territory. As to their 3009
coming into territory that we have previously occupied, that is one of the benefits of f.o.b. Pittsburgh and the delivered price. You know what you are shooting at (1903).

That kind of increase of competition in territory occupied by previous manufacturers goes on continuously. During NRA days we were recognized as one of the small manufacturers. As to other recognized small manufac-

turers, Hodell Products or Hodell Chain Company were recognized as one of the smaller chain companies, and the International Chain Company—all of the chain companies then making chain except the American, McKay, Pyrene, and Columbus McKinnon. Those four were the A group, and the rest of us were the B group (1903, 1904).

We have met very much more competition from the small companies since the NRA days. They have increased their capacity and it has taken business from those of us that were previously getting the most of it because of our electric weld facilities. As soon as they increased their facilities and got into this business, it split it up still further and
3011 they got a large part (1904).

I said that our initial capital in Cleveland was $20,000. We are now capitalized at a million dollars, but we wouldn't sell out for three times that amount (1904, 1905).

Examination by Trial Examiner Ballinger.

The manufacturer absorbs the freight on tire chains. That in effect is the same as though he had given a lower mill price, in all but the city in which he is located. As to whether that is to a certain extent offset by phantom freights which he benefits from, to allow freight on a product, you must first add into that product either enough profit or a certain amount for freight. If you add enough profit in, it just takes away from your profit and you do
3012 not benefit any by any phantom freight. On the other hand, if you add a cent a pound in for freight, then you are making a cent a pound on anything that you deliver into Cleveland, and our sales there are terrible. But when you ship down to Texas, you lose that cent a pound you made on your Cleveland deliveries and two or three cents a pound additional. As to whether there are certain of these transactions in which we benefit by what is known as phantom freight, it is a little clearer if you take the f.o.b. Pittsburgh

in discussing that question, because yesterday I showed you going down into Winston-Salem that there was about eight cents freight involved—let's say phantom freight. At that time we paid it to the customer instead of making it (1905, 1906).

"Trial Examiner Ballinger: I am not speaking about where the customer gets it. I am speaking about phantom freight, that is, freight charged by you which you do not in fact pay. Now, there are cases of that kind, are there not? And I say 'you', and I am speaking now of the manufacturers, not your company, in particular.

"The Witness: There are some cases, but they are 3014
washed out by the freight that we give to customers that are nearer the other basing points" (1906).

That is what I said yesterday. It is substantially right to say that the freight absorption was either in whole or in part overcome by the phantom freight. In balling up, you will find that your freight that you make money on is offset by freight that you lose money on (1906, 1907).

Redirect examination by Mr. Kittelle.

On welded chain, if we sold a man in Cleveland from our Cleveland plant, there would be no real freight charge at all. We would just push it across the street, but we 3015
would charge him freight from Pittsburgh to Cleveland. But most of the time he would deduct it from the bill, just between we boys here (1907).

As to whether there is any phantom freight of that type on any type of chain except welded chain, before I get all mixed up in this phantom freight business, will someone please define phantom freight to me? It is the freight we make on or the freight we pay on? (1908).

"Q. It is the freight in the situation that I just describe and I think that is where we are getting into a little trouble here, because the witness doesn't know what the Federa Trade Commission means by phantom freight. A. Let me give you an example.

"Trial Examiner Ballinger: I tried to designate that with some degree of accuracy. What I mean by phantom freight is freight that you charge for and collect but which you don't pay.

"*By Mr. Kittelle.*

3017 "Q. Which is not paid to the railroad. A. Now, what do you designate the freight that we don't charge the customer for, and pay out?

"Q. That is freight absorption, according to the Commission's definition. A. All right.

"Q. I think you had them backwards, didn't you? A. I always thought phantom freight was the one that we allowed or charged the customer and collected on and didn't do anything for.

"Mr. Steinhauer: That is right" (1908, 1909).

Redirect examination by Mr. Kittelle resumed.

3018 I can't see how there could be any phantom freight on any sale that we ever make of weldless chain. The amount of freight that we charge the customer is never greater than actual freight on weldless chain. We ship f.o.b. Cleveland, period. So, if it is cheaper to ship from Cleveland than it is to ship from Bridgeport or ship from York, there is no freight equalization, no allowance of any kind. There is no phantom freight collected. On the other hand, if the fellow down in York, Pennsylvania, buys from us

because he likes our quality or our personality, then we have to ship it from Cleveland and allow him the freight, or pay the freight to York, Pennsylvania, so that we never can make, but we always can allow when we approach a competitor's factory or shipping point (1909, 1910).

By Mr. Steinhauer.

That is on weldless chain (1910).

Redirect examination by Mr. Kittelle resumed.

When I made the statement that we came out about even on phantom freight as against freight absorption, it was 3020
in answer to the question as to welded chain. On weldless chain, since there is no phantom freight everything that we do is out of pocket. There is nothing to offset that. You can't offset any of your allowance. On tire chains we allow the customer the actual freight that he pays (1910).

"Q. You never charge him any more freight there than he has actually paid?

"Mr. Steinhauer: You don't charge him any.'

"Trial Examiner Ballinger: The Examiner had assumed that the record was fairly complete with reference to the particular kinds of chain upon which they derived phantom freight benefits and upon which they paid out.

"Mr. Kittelle: I got a little worried that the wit- 3021
ness maybe had phantom freight and freight absorption backwards.

"Mr. Steinhauer: Mr. Kittelle, I think he is still confused. I think yesterday he testified that the phantom freight just about equalled the freight absorption.

"The Witness: On welded chain I understood it to apply" (1910, 1911).

3022 *Louis D. Call—For Petitioners—Recross.*

Recross-examination by Mr. Steinhauer.

I think that the phantom freight we received on welded chain is about the same as the amount we absorbed on welded chain. We absorb the freight on welded chain when we ship east, when we ship to Pittsburgh, and when we ship into New York; and when we ship, for instance, to Winston-Salem, North Carolina, we had to absorb eight cents a hundred pounds, and there are many points where Pittsburgh has the benefit of Cleveland in the freight rate situation; on all of that we have to absorb (1911).

As to whether we have any records which would demon-
3023 strate that as a fact, you have our invoices for one month in '11, and I would be very glad to stand or fall on the results of that (1912).

Recross-examination by Mr. Schumacher.

As to the length of time between the making of a new price change effective by American and the time we learn about it, it would be about as long as it takes for the price sheets to get out into the territory that our men are continually covering, or to come from Bridgeport or York to Cleveland (1912).

We learn about it ordinarily within a couple of days after the change is made, except that we don't work on Saturdays. It is our practice upon those occasions when
3024 we learn of a price change to send telegrams to our salesmen advising them of the change so they won't miss out on sales (1912).

It takes a little longer than a day or two to put into effect a change in price made by American—a little longer than that for the machinery to get around to move. You can't telegraph a salesman and tell him of a hundred price changes in a telegram, because when the lists are changed and various changes are made, it is an awful job (1913).

"Q. Well, let's limit it to a change in discount, where you said pound chain A changed from 33⅓ to 33⅓ and two 10's. A. But there are a lot of other things on that sheet, hooks, wrought iron chain and dozens of others.

"Q. Let's put those in too. A. On wrought iron chains, the lists on that very often go up and down as the iron market changes and other things.

"Q. Well, you sent the telegram. Suppose you tell me what you put in it? A. 'Effective October 1, American chain prices were advanced approximately $2.00 per ton. Air mailing you details.' When he goes into a customer, then he isn't a dumbbell. 'Yes, I know the prices have gone up. The factory hasn't advised me with the details, but 3026
I will get them in a day or two'" (1913).

"Q. I believe you testified some of your customers in Cleveland objected or refused to pay phantom freight on welded chain. A. They don't object. They just take it off.

"Q. They just don't pay it. In other words, all your customers don't like that method of selling? A. Well, for one or two jobbers that we sell in Cleveland, compared to the hundreds of jobbers all over the country that never object or say anything about it, I would say that is comparatively unimportant" (1913, 1914).

As to whether we receive objections to phantom freight, except objections made by jobbers in Cleveland, there are months when we don't get a single letter on the subject. Frequently we have someone write in and ask what it is, and then we write them a nice letter and tell them what it is 3027
1914).

Everybody, except those two jobbers in Cleveland, doesn't care about it. They just add their profit onto their net cost and let it go at that. It isn't a bit a big item (1914).

"Q. I believe you testified that in the case of weldless chain that you I assume in that answer you meant Cleveland Chain Company would never charge phantom freight

You restricted that to the Cleveland Chain Company, th
answer.

"Mr. Kittelle: I so restricted the question.
"The Witness: I will make it broader, if you wa
me to do so" (1914, 1915).

Recross-examination by Mr. Schrimsher resumed.

If Western in Chicago sold under the freight equalizati
system to a customer in Chicago there would not be phanto
freight, because they adopted an f.o.b. Chicago base.
3029 they sold under the freight equalization system there wou
be phantom freight there if there wasn't a factory the
As to whether there is a factory there, they have fixed it
there isn't any phantom freight there, because they ha
made it a basing point. As to whether there wouldn't
phantom freight if they sold on the freight equalizati
system to a customer in Chicago equalized with Clevelan
I will answer by saying if they had no factory, and if th
purchased the chain from Cleveland, yes, because th
would have to pay the freight from Cleveland to Chica
to get it there (1915, 1916). There would not be phanto
freight to the customer because the chain, under my su
position, would be made in Cleveland and bought by the
in Chicago and shipped to Chicago, and therefore t
freight would naturally follow from Cleveland into Chica
3030 If the chain were actually made in Chicago there would
phantom freight if they equalized with Cleveland. If y
are going to suppose all around the room on a questio
yes (1916).

I have testified that I didn't know exactly when the
two companies started making weldless chain, Weste
and Peerless (1916)

E. W. TAYLOR, called as a witness for the Petitioners, testified as follows on November 7, 1947:

Direct examination by Mr. Kittelle.

I am connected with the S. G. Taylor Chain Company. I am its president. I first came to work for the company part time about 1908 and full time for a few months in 1917 when I couldn't get in the First World War. Then again in 1921, and on a full-time basis ever since (1918).

From time to time since 1921 I have held positions with the company from engineer to assistant secretary, secretary, vice-president and president. The company was 3032
organized in 1873. It belongs to my family. It is a closely held corporation. At the present time we manufacture tire chains, pound chain and alloy chain. We do not manufacture any weldless chain, but we sell it. We get it from various manufacturers, American Chain and Cable Company, Cleveland Chain and Manufacturing Company, or rather I should say from the Bridgeport Chain and Manufacturing Company (1919).

Our weldless chain business is very small. It is entirely a matter of convenience to our customers. Our customers put in an order for it along with orders for the other stuff that we make. Our dollar volume of weldless chain in normal times per year runs around two thousand dollars. I think that was the highest—from there downward to nothing during the war. We couldn't get any weldless 3033
chain at that time (1919, 1920).

Our company first started making welded chain in 1873 and first started making tire chain in the winter of 1932-33. Our plant is located in Hammond, Indiana. We have just one plant. Prior to June, 1945, our company sold welded chain f.o.b. Pittsburgh basis. I would like to qualify that. We sold our wrought iron chain previous to 1925, I think it was, on an f.o.b. Hammond basis. When we started

manufacturing alloy chain, about twelve years ago, it was originally on an f.o.b. Pittsburgh basis, and then in 1939 Columbus McKinnon Chain Corporation, who is the leader in that branch of the industry in alloy chain, published a price list on an f.o.b. freight allowed to destination basis and we followed shortly after that (1920, 1921).

Since that time we have not made any change in that method of selling alloy chain. Alloy chain has about twice the tensile strength of ordinary welded chain—much better wearing qualities (1921).

The general shape of it and the sizes and so on are approximately similar to the ordinary welded chain. However, there are not as many sizes (1921).

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The diameter sizes of alloy chain range from 9/32-of an inch, and we go as high as 2 inches. That is electric welded (1922).

The term "alloy" implies that it is not ordinary steel but some type of alloy steel. To my knowledge there are two other companies besides ourselves that make this type of chain although there are other companies that show it in their catalogs. Columbus McKinnon Chain Corporation and American Chain and Cable Company are the two that make it. Since 1925 we have sold our wrought iron chain f.o.b. Pittsburgh and up to June 1945 (1922).

As to why, prior to 1925, we sold it f.o.b. Hammond, we had a quality product that was advertised. As a matter of fact our prices were a dollar per hundred pounds higher

3036

than McKay, and fifty cents per hundred pounds higher than American Chain and Cable Company. They were the same as Columbus McKinnon. It was a quality product and it was sold on a performance basis (1922, 1923).

It differed from ordinary welded chain in that it was made out of wrought iron. As to its use, the larger sizes were used primarily on the old railroad type of steam shovel, which was discontinued in favor of the revolving

type of steam shovel. The latter type was equipped with wire rope. And while the steam shovel will last about twenty years, that type of business continued on a replacement basis for some time. The railroads discontinued the use of this type of steam shovel that used the wrought iron chain in 1918 approximately (1923).

We changed from f.o.b. Hammond to f.o.b. Pittsburgh on this wrought iron chain in 1925 because of the decreasing demand and the necessity for a larger market. We also changed our prices—we lowered our prices—to equal those of the American Chain and Cable Company. We lowered our prices so that they were the same as the American Chain and Cable Company's prices (1923, 1924). 3038

Before that time our prices had been higher than the prices of American Chain and Cable Company. I testified that because of the quality of our product people would pay more for it. Since June 1945 we have sold chain on an f.o.b. factory basis equalizing with Pittsburgh, and since the first part of 1947 equalizing with Winona, Minnesota (1924).

If we sold our welded chain; since June 1945, to a customer in Chicago, we would charge it to him f.o.b. Hammond, and he would pay the trucking charges into Chicago. We would make no allowance or anything of that sort. We would not charge him with the freight from Pittsburgh. If we sold a customer who was located in Pittsburgh we would allow him the freight from Hammond, Indiana to Pittsburgh (1924, 1925). 3039

He would pay the railroad for the transportation from Hammond to Pittsburgh and we would allow him the full amount of that so that he would get his chain laid down in Pittsburgh at our price without being out of pocket anything for transportation. We also equalized freight with Winona, Minnesota. We started doing that about February of this year. Only on items that are manufactured in Winona. The reason we started equalizing with Winona

in February of this year is because we chose to recognize Winona as a competitive basing point (1925, 1926).

We reached that decision because the Peerless Chain Company was selling welded chain f.o.b. Winona. They commenced doing that about the first of this year (1926).

Previous to that I don't know what basis they had sold it on. We stopped selling welded chain f.o.b. Pittsburgh in June 1945 and started selling it f.o.b. Hammond, Indiana on advice of counsel, Sidley, Austin, Burgess and Harper of Chicago (1927).

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They told us that because of the Supreme Court decision
3041 in the Staley and Corn Products cases that we had better change to an f.o.b. factory basis (1927).

I am familiar with the Donley Freight Book put out by the Chain Institute. We do not use that book at the present time. There have been so many changes in freight rates that the Donley Freight Book became so marked up we couldn't tell where we were. At the present time we use the Climax Corporation, located in Chicago, as a source of freight rate information (1927, 1928). We started using that in 1924. Prior to June 1945, when we were selling on this f.o.b. Pittsburgh basis, I never had or overheard any conversations with competitors on the subject of that method of selling. When we made this change from f.o.b. Pittsburgh to f.o.b. Hammond in June 1945, we did not
3042 put out our new published price lists showing the f.o.b. Hammond basis until we ran out of price lists. We got that information to our customers that we were now selling f.o.b. Hammond by billing them that way, and also in making any new quotations. We instructed our salesmen. Eventually we issued new price lists showing the f.o.b. Hammond basis on welded chain. We did this about September 1945 (1928, 1929).

Usually we send copies of our price lists to our competitors but we didn't do it at that time, I don't believe. Our competitors learned that we had issued those price lists. They asked us why we had changed from f.o.b. Pittsburgh to f.o.b. Hammond. I told them we had don it on advice of an attorney. That was the substance of the whole conversation (1929, 1930).

The small quantity of weldless chain which we sell, we sell f.o.b. Cleveland, as being the nearest basing point. I testified that we do not manufacture any weldless chain. When we buy it from American Chain and Cable Company or Bridgeport Chain and Manufacturing Company, we buy it from them on an f.o.b. Cleveland basis. If it is 3044
shipped from American Chain and Cable Company's plant at York, we pay the railroad freight from York to Hammond, Indiana. We pay the railroad. As to the allowance or adjustment on that received from America, they add the freight from Cleveland to Hammond and allow the freight from York to Hammond (1930).

If we buy weldless chain from the Bridgeport Chain and Manufacturing Company we pay the railroad for the freight from Bridgeport to Hammond, Indiana. To adjust that the Bridegport Chain and Manufacturing Company add on the invoice the freight from Cleveland to Hammond and allow the freight from Bridgeport to Hammond (1930, 1931).

In each of these cases, whether we buy from American 3045
Chain and Cable Company or Bridgeport Chain and Manufacturing Company, the amount we pay for that weldless chain, laid down in Hammond, Indiana, is equal to the base price, plus the freight from Cleveland to Hammond (1931).

We get a discount from these manufacturers when we buy from them beyond the jobber discount. That is our margin of profit. That is our gross profit. Our receiving, shipping and billing costs go against that. I said that when

we resold it we resold it on an f.o.b. Cleveland basis. We do not make any weldless chain sales back East so that we would have to resell on an f.o.b. York or f.o.b. Bridgeport basis. That would be ridiculous (1932).

If we sold some weldless chain to a customer in Chicago we, in billing him, would add the freight from Cleveland to Chicago, which happens to be the same as Cleveland to Hammond, and allow the freight from Hammond to Chicago. The result would be that that customer would be paying the base price plus the freight from Cleveland. That is the same price that we paid for it, except for that discount which we got (1932).

3046 The customer pays the trucking from Hammond to Chicago because we have allowed the trucking or the freight rate from Hammond, Indiana to Chicago on the face of the invoice. He pays the trucking, but we allow that so he gets that back (1932, 1933). He pays the same price delivered in Chicago that we pay in Hammond, except for that discount, but he has gotten free trucking from Hammond to Chicago (1933).

I am familiar with the Western Chain Company in Chicago. I do not know whether they are now selling weldless chain. I have heard that they presently manufacture weldless chain, but from personal knowledge I do not know. Peerless Chain Company up in Winona, Minnesota manufactures a very small amount of weldless chain. They started to manufacture what they call their twin loop chain, 3048 which is similar to American Chain and Cable Company's Tenso chain, back in 1941, I think—it was just before the war. They started making jack chain last year (1933, 1934).

Prior to that time they bought it and resold weldless chain. I might add there that they made the lock link type of chain, for which there is a small demand, for some time, primarily because that was used in the manufacture of tire chains (1934).

That was used as a side chain for tire chains. I have seen the machines for making weldless chain which Peerless Chain Company has. I was in their plant just recently, about six months ago. They have two machines for making the lock link type of chain; one machine for making the Tenso chain, and one machine for making jack chain (1934). That is a very small production capacity (1934, 1935). I have never had nor overheard any discussions among competitors with regard to this method of selling weldless chain which exists in the industry (1935).

We started making tire chains in 1932 or thereabouts. When we started to make tire chains we sold them on a delivered basis, f.o.b. factory, freight allowed, at lowest 3050
tariff rate to destination. In other words, if the shipment went by express, the customer paid the difference between the freight and the express charges. We would allow him the freight charges because that was the lowest tariff rate (1935).

We have sold a carload of tire chains to one customer. In that case we allow him the carload freight that he pays. If he bought less than a carload he would receive the l.c.l. or less than carload freight credit. We have a quantity limitation, that is, unless the customer buys a certain number of pairs or a certain number of pounds, we will not allow the freight. That has varied from time to time depending on what competitive conditions are. At the present time it is on the basis of twenty-four pair or sets of passenger car chains or their equivalent. I do not recall what 3051
it was in 1932 when we started in the tire chain business (1936).

When we first came into the tire chain business in 1932 I did not have any discussion with competitors as to this method of selling or whether we would adopt that method or some other one (1936, 1937).

As to the steps we took when we started in the tire chain business as a new manufacturer to break into the business,

we went around to semi-jobbers—made jobbers out of them—and sold or attempted to sell jobbers that had been previously sold by other manufacturers of tire chains. At that time we attempted to find out what prices our competitors such as American Chain and Cable Company were charging for tire chains. That was very easily obtained. We got it from friends of ours, jobbers in the automotive field. They got the whole price lists (1937, 1938).

As to making our prices in 1932, when we were starting in the tire chain business, the same as or higher or lower than those of American, it depended entirely on what we had to do in order to get the business. In most instances,
3053 I would say, the prices were lower than those of American Chain and Cable Company on tire chains. From that time on up to the beginning of the war our level of selling prices on tire chains has been lower than those of American (1938).

So far as our respective list prices are concerned, they have always been the same. The discounts, the published discounts—have varied between what our other competitors did. In other words, if they published a longer discount than the American Chain and Cable Company's, we published that. If they published the same discounts, then we published that. After all, you don't want your competitor to know everything you are doing (1939).

The other competitors whose discounts we followed on tire chains were Western Chain Products Company, Cleve-
3054 land Chain and Manufacturing Company, Peerless Chain Company, Nixdorff-Krein Manufacturing Company. Those are the principal ones (1939).

When our list prices and published discounts were the same as those of American Chain and Cable Company we sold lower than that on actual sales. There was no fixed percentage or definite percentage throughout the years by which our prices varied from those of American Chain

The differential varied depending entirely upon what competitive conditions were. There was a differential during the NRA days of five percent between our prices and the prices of American Chain and Cable Company on tire chains. Ours were five percent lower (1939, 1940).

From the NRA on up to the beginning of the last war I said that the amount by which our prices on tire chains were lower than those of American varied. As to the extent of the variation, we didn't go quite as far as some of our competitors did. The lowest price that we ever quoted was sixty per cent, two ten per cents and a five per cent (1940, 1941).

When we quoted that price or discount the published dis- 3056
count of American Chain and Cable Company, I think was fifty per cent and seven percent. As to a more precise time than the period from the end of NRA up to the beginning of the last war when this occurred, these extreme prices existed in 1939—the Winter of 1939-1940. We had had several winters that had been open, with no snow, and the demand for tire chains had been very light. It was the lack of snow more than anything that caused these low prices (1941).

I have participated in discussions of price cutting in past transactions that were had from time to time among some of the members of this industry. I know Mr. Dennis Merriman. He has had no authority or control over our prices or business practices (1942).

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I have been president of the Chain Institute. As to when that was, I don't remember. It was back in 1937-1938, I think something like that. I was president for one year. I have worked on several different committees of the Chain Institute—specifications, and other committees. As to whether I have attended meetings of the Chain Institute regularly, I have missed a few—maybe half a dozen—over a period of years (1942, 1943).

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I have telephoned or asked Mr. Merriman to check up on a competitor's price for me. He reported back to me, but usually he didn't get any information. But the idea was to check the buyer, whether the buyer was lying or whether the information we had gotten from our salesmen was correct or not. Mr. Merriman has called me and asked about an alleged cut price of ours. I have given him information on it. He would never tell me who it was who had asked him to make the inquiry (1943, 1944).

As to the size and extent of our plant in 1921 when I first started working for my company on a permanent basis, we had about fifty or sixty employees, and about 25,000 square
3059 feet of floor space. Today we have about 70,000 square feet and we would like to have about 350 employees, but we can't get them. It is on account of the labor shortage (1944).

By Mr. Steinhauer.

At present we have about 200 employees (1944, 1945).

Direct examination by Mr. Kittelle resumed.

We are equipped to handle 350 employees (1945).

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I will describe the events leading up to the time that we
3060 became a party to the Shirley, Olcott and Nichols arrangement. I talked to Mr. Kirkpatrick of the American Chain and Cable Company. As to the discussion I had with him, he asked me whether we would like to furnish approximately one-fifth, or 20 per cent, of the bar reinforced chain that would come under the Treasury Department procurement contract, and I told him that we would like to very much. I didn't know as much then as I know now. I think the record will show that we did not get the 20 per cent

We considered our participation in the Shirley, Olcott and Nichols arrangement as part of our rights as a licensee under American Chain and Cable Company's patents (1966, 1967).

* * * * * *

Direct examination by Mr. Duncan.

So far as the tire chain business is concerned, we started in at scratch in 1932. Today about 30 per cent of our entire chain business is tire chain business. In the NRA days we were rated as one of the very small manufacturers. From that time on our tire chain business has increased every year (1968).

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Cross-examination by Mr. Steinhauer.

We use various alloys in alloy chain depending upon what work the chain is to do. We have nickel in some of them. Other alloys in our alloy chain—chromium, molybdenum, manganese—it depends upon what the job is. In 1924 and 1925 we changed over from FOB factory price to FOB Pittsburgh on our wrought iron chain. It is not true that the steel producers and the iron makers changed over to Pittsburgh base at that time, the Pittsburgh basis. Iron has always been sold FOB mill. Iron is still sold today FOB mill. It is steel, not iron, that has gone FOB Pittsburgh. It so happens that the two mills that we buy iron from are located in Pittsburgh, but there are other mills, very few in the country now. We buy some iron FOB Terre Haute, Indiana (1969).

3063

We didn't change over to the Pittsburgh basis because wrought iron manufacturers were doing that. We changed over from the Hammond base to the Pittsburgh basis in about 1925. The iron manufacturers did not change over to the Pittsburgh basis themselves. The western mills were closing up. The demand for iron had been decreased. A-

a matter of fact, we had been buying from the mills east of Pittsburgh and from these we paid the Pittsburgh freight (1970).

We equalized with Winona on pound chain—that is welded chain. The Peerless Chain Company started to sell FOB Winona and we chose to recognize it as a basing point. We have done that since February, 1947. We intend to continue it. We are now on the Hammond base on wrought iron. As to whether we find that satisfactory, our iron business, because of our alloy chain business is down practically to the vanishing point. It is not because we went on the Hammond base instead of the Pittsburgh base. It is
3065 because of the fact that we are putting our sales emphasis on alloy sales as against wrought iron sales (1971).

As to how we started to base our welded chain on Pittsburgh, we based our welded chain on Pittsburgh because that was the industry practice, and that was where we got our steel from, incidentally. It wasn't until about 1918 or 1919 that we started getting our steel from local mills. It is true that I didn't go into this business until 1921, but I worked summers. I knew about what was going on at that time (1972).

As to how we happened to go into the pricing on weldless chain on a multiple basing point, we never discussed that. We just took what was already existing in the industry. We didn't talk to anybody about it at all (1973).

We just walked right into it (1973).

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By Mr. Baker.

We first started to sell weldless chain about 1934, somewhere between '34 and '36. The only weldless chain we manufactured was some lock link chain in connection with our tire chains. We never sold that (1973).

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Cross-examination by Mr. Steinhauer resumed.

We get copies of the American price list on tire chains right along, and we copy them when we get them and that becomes our price list (1973, 1974).

Examination by Trial Examiner Ballinger.

We copy American's price list on the items on everything except this rod chain which we are licensed to manufacture under Peerless Chain Company's patents (1974).

"Trial Examiner Ballinger: Now, let me see if I understand your testimony now and your testimony previously. I understood you to testify previously that you took the American's price list and the McKay, and possibly some of the other price lists, and you followed the American except where some of the other price lists had a lower price, in which event you adopted the lower price. 3068

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"The Witness: The list prices were always the same.

"Trial Examiner Ballinger: It was only in the discount.

"The Witness: It was only in the discount. Now, when we were selling Peerless diamond link, we used Peerless prices on that type of chain. 3069

"Trial Examiner Ballinger: Well, your price list also ~~contained~~ a statement with reference to discounts, did it not?

"The Witness: The discount—there was a discount sheet which was entirely separate from the price list.

"Trial Examiner Ballinger: Did you follow American on the discount sheet?

"The Witness: No, sometimes we did and sometimes we didn't depending upon what competition was" (1974, 1975).

Cross-examination by Mr. Steinhauer resumed.

As to when we would not follow American's discount sheet, we would not follow American Chain Company's discount sheet when competitive conditions were keen and the supply exceeded the demand. I cannot tell you exactly what periods those were, but it is all in the record. You have our prices.

3071 *By Mr. Kittelle.*

My best recollection is that the majority of the time we had a greater discount than the American Chain Company (1976).

Cross-examination by Mr. Steinhauer resumed.

Ever since we started (1976).

Examination by Trial Examiner Ballinger.

So far as the price list is concerned and with no reference to the discount sheet, we adopted American's price list. That is just about like the alphabet (1976, 1977).

3072

Cross-examination by Mr. Steinhauer resumed.

I couldn't say what years we did or did not follow. It is just my recollection that that might be. I wouldn't be surprised to find one way or another from that (1977).

As to price discussions with Merriman, he would ask us or ask me—he practically always talked to me—whether we had had some business from, for instance, the John

Jones Hardware Company, and if we had, what price we had taken that business at and I told him whether we had or whether we hadn't (1977).

He was trying to find out whether we had cut prices. As to whether it was part of Merriman's job to try to stabilize the industry, it was part of his job to determine whether the jobber, purchasing agent, or the buyer's purchasing agent was lying, and to find out also whether the manufacturer was cutting his published price. He would give that information to the party requesting it (1977, 1978).

Examination by Trial Examiner Ballinger.

As to what we did with such information imparted to us 3074
by Mr. Merriman, we usually met the price. We did not pass on that information to somebody else. We kept it for our own information. If we disclosed our hand by going to the manufacturer making that price, then that manufacturer or the manufacturer's salesman, after being called on the carpet, would very likely go back to that purchasing agent and say, "Why, you so and so, you gave me away." All of which so and so would be very complimentary (1978, 1979).

Cross-examination by Mr. Steinhauer resumed.

I would say that the work of Mr. Merriman in attempting 3075
to stabilize prices has had some good results so far. Mr. Merriman is very well known throughout the country. I have traveled with him many times, and I have yet to walk into a hotel lobby without him greeting somebody by their first name. He has a very wide acquaintance and is highly respected among the jobbing trade. The chain industry got into very bad repute with the buyer, primarily because the buyer never knew whether he had the lowest price. As to whether Mr. Merriman would straighten up that situa-

tion, I would say economic conditions have straightened it out, the demand exceeding the supply (1979).

Mr. Merriman had some factor in that result (1980).

Examination by Trial Examiner Ballinger.

With those off list prices a buyer never did know. After he had just placed an order, another salesman would come in and quote him a lower price the next day, and how would he feel? He certainly wouldn't feel friendly towards the people he placed the order with. He never knew what the bottom was (1980).

3077 *Redirect Examination by Mr. Kittelle.*

I said that I first started working for this company in 1908, part time. I wouldn't know how our company at that time was selling its welded chain. I have seen records that we were selling f.o.b. Pittsburgh at that time. I do not know when our company first started to sell f.o.b. Pittsburgh nor why. We do have books going back to 1873 though. My earliest recollection with the company is that they were selling that way. The record shows that Mr. Merriman came into this industry about 1938, July, 1938 (1980, 1981).

The price cutting going on in the industry at that time was as bad as I have ever seen it. He did not stop it when
3078 he came in. It continued until it gradually decreased as the demand for chain picked up due to the war (1981).

Recross Examination by Mr. Schrimsher.

I testified that we use the Climax freight rate service since 1924 for the sale of welded and weldless chain. We have used the Donley freight rate book since 1934. We used it up until about a year ago or two years ago when these various increases in freight rates went into effect.

so that the book itself is practically obsolete. We used it practically all the time then that we were on the f.o.b. Pittsburgh basis (1981, 1982).

"Trial Examiner Ballinger: Let me see if I understand that. Did you use the Donley freight rate book as your guide, your sole guide for freight rates?

"The Witness: No, we used the Climax Corporation for checking freight rates. There were also some destinations to which we shipped chain that were not shown in that book, and we would get the information from the Climax Corporation.

"Mr. Steinhauer: You refer to weldless chain now?

"The Witness: And welded" (1982, 1983). 3080

Recross-examination by Mr. Schrimsher resumed.

We used both of those freight services for selling welded chain. In selling tire chains I testified that we sold a little below what American sells for generally. That is not true in the case of bar-reinforced tire chains. We sell those on identically the same basis as the American Chain. We sell those at the same price as American (1983).

I stated that we had not sold to the Government any standard tire chain through the Shirley, Olcott and Nichols arrangement. We did bid on standard tire chains to the Government. I do not recall that we bid on bar-reinforced chains to the Goverment at a different price than American 3081
bid (1983, 1984).

"Q. I would like to show you Commission's Exhibit 902-A to H. That is an abstract of bids made up by the Treasury Department, Procurement Division.

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"A. That is a higher price.

"Q. What was, American?

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"A. It is 5.5 to 5.3.

Q. Theirs is higher—or yours is slightly higher? A. Ours is higher.

"Mr. Kittelle: Two-tenths of one percent, is that right?

"Mr. Schrimsher: Yes.

* * * * * * *

"Mr. Schrimsher: Those bids were filed in October, 1939, for a contract period of January 1 to June 30, 1940" (1984, 1985).

3083 I presume Shirley, Olcott enjoyed some business on standard tire chains after we became a licensee of American. I have no definite knowledge, but we didn't ever receive any business on standard tire chains from the Government (1985).

We bid differently than American in October, 1939 to keep on the list of the Procurement Department, but we didn't want the business. We did have some business from Shirley, Olcott after January 1, 1940. As to whether we accepted business from the Government under that particular contract, we are not a large enough outfit to handle the whole thing. We didn't want the whole thing (1985, 1986).

3084 *Examination by Trial Examiner Ballinger.*

The bids did not call for contracts for definite amounts. They were for requirements, whatever the Government might order. The orders would usually come through just at the time when you were busiest, and with the small shipments of one or two sets, it would clutter up your shipping room and make it more difficult to handle customers that you could keep on a service and a friendship basis (1986).

* * * * * * *

Recross-examination by Mr. Schrimsher resumed.

The fact that we bid one-tenth percent higher than American on the standard tire business on that bid certainly is an occasion that we didn't want the business. We wanted to keep on the Procurement Department list. They buy other types of chain that we have sold them from time to time. We didn't want to be in the position of refusing to quote. We didn't have to quote on that item. That was a combined bid. They had two items, standard tire chains and bar-reinforced, and we bid on both of them. We bid high in both cases because we didn't want the business. We took some of the business when it came to us through 3086
Shirley, Olcott and Nichols on the bar-reinforced tire chains, because it was a very small percentage, only a small amount of business (1986, 1987).

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GEORGE H. BOUCHER, called as a witness for the Petitioners, testified as follows on November 7, 1947:

Direct Examination by Mr. Kittelle.

My address is Orange, New Jersey. I am connected with Pyrene Manufacturing Company as vice-president. I have held that position since 1944 and I have been with the 3087
Pyrene Company since 1929. I first came with them in 1929 as sales promotion and advertising manager. In 1930 I was assistant general sales manager, and in 1936, general sales manager (1989, 1990).

I still hold that position. E. G. Weed, whose name appears in the minutes of the meetings of the Chain Institute in the record, was a vice president of Pyrene Manufactur-

3088 *George H. Boucher—For Petitioners—Direct.*

ing Company. He is dead. He died in 1945. When he was living, he was my superior in the company (1990).

The Pyrene Manufacturing Company makes fire extinguishers and tire chains. As to the reason the company makes these apparently disassociated items, it took me a long time to find that out myself. It appears that we had a large distribution of fire extinguishers in the automobile field, considered a safety item, and were looking for other safety items to sell through the same channels and we picked up this patented chain. We sell fire extinguishers in the automobile field through automotive jobbers handling automotive accessories and parts (1990, 1991).

3089 We were making fire extinguishers before we were making tire chains. We have been making fire extinguishers since 1907 and we started to make tire chains about 1921. I suppose, yes, I would say that it was right after the American Chain and Cable Company's patents had expired (1991).

When we first went into the tire chain business in 1921 we started making passenger chains under this patent, and had a chain known as the Off and On. That was our trademark. The patent was owned by the Pyrene Manufacturing Company. It was a conventional type chain, similar to other chains on the market with this exception: The link that the cross chain hook was attached to was flat, which permitted the installation of cross members on the rim chain without tools (1991, 1992).

3090 That was so the customer or the consumer could take them off and put them on. We sold these tire chains all assembled at the plant. We continued manufacturing the Off and On type of tire chain until about 1926 or 1927, somewhere along in there, just before I came with the company that they made the chains (1992).

During that period the company did not sell any ordinary regular unpatented tire chain of the kind that the

Weed patent had expired on for passenger cars, but they did for trucks. At the time the company stopped making the Off and On type of tire chain they went to the conventional type. Our plant for the conventional type of tire chains is located at Newark, New Jersey. We have only one plant for tire chains. Our fire extinguisher plant is located in Newark also. It is a different plant (1992, 1993).

"Q. Did you make your own chain for tire chains, or do you buy it and assemble it? A. Practically everything but the patented bar-reinforced cross chain.

"Trial Examiner Ballinger: You mean that you manufactured it or that you buy it. 3092

"The Witness: No, the question, as I understand it, sir, was do we make it" (1993).

Direct examination by Mr. Kittelle resumed.

The patented bar-reinforced tire chain is something different from the Off and On type. The bar-reinforced chain is the type that is covered by American Chain and Cable Company's patents. Pyrene Company was one of American's licensees (1994).

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Pyrene does not manufacture or sell any commercial welded chain. It never has to my knowledge. Pyrene does not manufacture or sell any weldless chain. As to whether it has ever done so, I might qualify my answer there when 3093 you come to weldless, because when we were first in the tire chain business, the passenger side chain was a weldless type chain, and we manufactured that, but only as a component of our tire chain. We never sold it for any other purpose (1994, 1995).

Since that time we have changed from the weldless side chain to the welded side chain. After we made that change, we did not manufacture or sell any more weldless chain

in any form. Our company has no plans nor intentions of manufacturing any welded or weldless chain. The only chain we make is tire chain. We did not make any cold shuts or hooks that have been described here. We have never done that (1995).

The Pyrene Company is a member of the Chain Institute. It has not to my knowledge ever received a copy of this Donley freight book, but that applies to pound chain and we don't make it. We do not use that book at all. When I first came with the Pyrene Company in 1929 they were selling the tire chains f.o.b. the mill, with freight allowed to destination in definite quantities. As to what was the
3095 quantity on which we allowed full freight in 1929, from memory, I would say, it was about 500 pairs or the equivalent. As to the equivalent, if there were truck chains included, one pair of truck was the equivalent of three or four pair of passenger chains. That quantity limitation has not remained the same up to date. It has changed. Today it is twenty-five pairs of passenger, and I believe eight pairs of trucks. I believe the equivalent is three to one (1996, 1997).

We now sell f.o.b. Newark, New Jersey, at our plant and allow the freight if the customer buys more than this specified quantity. The result is that the customer pays the same delivered price, no matter where he is located (1997). If he buys less than that quantity, which is presently 25
3096 pairs, then he pays the freight, and we give him no allowance for it. As to my knowledge from the records of the company or otherwise how long the company has been using that method of selling, from the records that were available to me when I came there, they had used that method from the time they went into the tire chain business in 1921 (1997).

There has been no change in that method of selling by my company from that time on up to the present time on tire chains. The company uses that method of selling because it

is generally used in the industry, and in our opinion it is an economically sound way to sell chain (1997, 1998).

We sell our fire extinguishers on practically the same basis, f.o.b. the factory, with freight allowed on definite quantities. We have a uniform delivered price, regardless of where the customer is located. That is very general among other fire extinguisher manufacturers. I make personal contacts with these automotive jobbers. I know that the vast majority of products sold through those channels are sold on the same basis, f.o.b. the mill, with freight allowed to destination. The method is the same. The difference might be in the quantity and some manufacturers allow on a weight basis and others on a unit basis (1998, 3098
1999).

I first started to go to Chain Institute meetings shortly after NRA. When Mr. Weed was alive he and I went to them together, invariably. Since his death, I am the representative of Pyrene at these meetings (1999).

I have never had nor have I ever heard any discussion among competitors as to this method of selling tire chain, that is, f.o.b. plant, with full freight allowed. I have never had any communication with any competitors on that subject. I have never had any communication with any competitors on that subject. I have never overheard any such discussion among competitors. When Mr. Weed was alive, he never told me that he had overheard any such discussion (1999). I feel definitely that our company is free to change from that method of selling tire chain to some other method 3099
if it wants to (2000).

We do not have any warehouse stocks of tire chain at the present time. As to whether they are a little short now, that would be a trade secret normally, with two competitors sitting in the room, but we are all in the same position (2000).

At the period prior to the beginning of the present war we had warehouse stocks of tire chains. We had ware-

house stocks in the same offices where we have warehouse stocks of fire extinguishers. Those offices were in Atlanta, Georgia, Chicago, Illinois and San Francisco, California. During the period prior to the present war we had warehouse stocks outside our branch offices—warehouse in Kansas City and Texas, or used to, I believe. As to Houston Texas as a market for tire chains, when we warehoused down there they were just opening the new east Texas oil fields, and there was a considerable market for chains at that time, which has since diminished (2000, 2001).

That was on account of mud conditions, and the lack of hard surfaced roads in the area. Considering the period
3101 prior to the beginning of the last war, we put consigned stocks of tire chains into the hands of our jobbers. We offered it to all of the jobbers. It was on a 50-50 basis. If they bought a thousand dollars worth of chains, we consigned a thousand dollars. As to our experience as to whether or not jobbers generally tended to carry enough stock of their tire chains to take care of any emergency that might arise, prior to the depression in the early 30's, I think some jobbers did endeavor to carry stocks to take care of their normal requirement and to take care of the abnormal demand that might result from a snow storm or bad weather. During the depression years, when jobbers were endeavoring to reduce inventories, there was a great reluctance on their part to carry enough of a seasonal item, like tire chain, to take care of any abnormal demand that
3102 might result from bad weather (2001, 2002).

The consignment method was devised primarily to meet that situation. I might add that if you don't have the chains there when the storm hits, you have lost the business that results from it (2002).

As to the names and locations of our competitors' plants, St. Pierre in Worcester, Massachusetts. I don't know whether Cleveland is manufacturing tire chains in their newly acquired plant in Trenton, in our back yard. York,

Pennsylvania; Hammond, Indiana; Chicago; Winona; Cleveland—I don't know whether I missed any or not; Columbus-McKinnon, Tonawanda, near Buffalo, New York (2002, 2003).

"Q. If you were required to sell all your tire chains f.o.b. factory, f.o.b. your factory in Newark, New Jersey, and were not allowed to make any freight allowance or equalize freight in any way to get in someone else's territory, and all your competitors were required to do the same thing, that is, sell f.o.b. their plant and not allow or equalize freight to get into your territory, how much of a territory, geographically, would you have in which you could sell tire chains, will you describe it, please? 3104

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"A. I would say it would extend half-way between the location of our plant in Newark, New Jersey and the location of the plants that I have mentioned, Worcester, York, Tonawanda, or where the freight rates are equalized" (2003, 2004).

As to my knowledge of the extent of the demand for tire chains within that territory, Newark being located in the center of the metropolitan area or in a metropolitan area, I won't say the center, a thickly populated area, with a large car and truck registration, potentially is quite great (2004).

If we had to sell on an f.o.b. mill basis and stay in that territory there would be enough business there to take care of our present plant capacity because of our strategic location (2004, 2005). 3105

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I did not attend any Code Authority meetings during the NRA in the Chain Institute.

I rarely participated in discussions among the members of this industry about price cutting in past transactions, but I did in some (2010).

I am familiar with the term "price war". It means a war of prices between competition, one seeing how much

lower he can sell it than the other. I could elaborate on that. Usually when the potential in an industry is lowered by economic conditions, and there are several manufacturers in an industry with a plant capacity which they would like to maintain, very often some unwise manufacturer hopes to maintain his plant at full capacity by cutting prices. Naturally the competitor who wants to protect his interests meets the price, or maybe he will be more anxious than the first culprit and may quote a price lower. Then you get into a vicious circle and that winds up in what we usually call a price war (2010, 2011).

There have been such price wars in the tire chain business
3107 to my knowledge. In the depression years, in the early 30's when the situation I just described took place, economic conditions were such that the potential volume or demand, rather, for tire chains was at a low ebb, and a number of manufacturers were trying to maintain their production capacity. That condition continued until there was a change in the economic situation, where the demand for tire chains caught up with the manufacturing facilities. That happened in 1939, '40 or '41, in that period when we started to prepare for war (2011, 2012).

As to how much down prices or discounts went on tire chains during that period, what the published discount was and then what the discount actually got down to, frankly, we were never very much involved in this price war that I described, because our policy was selling only through job-
3108 bers. We never sold to the so-called automotive chains that were described in other testimony here, and it was through those channels that this price war existed chiefly (2012).

As to how far down it got, I heard of prices down to a discount of 60, 10 and 10, and I heard testimony here this morning that the prices went down as low as 60 and four 10's. That was news to me. As compared to a published discount of 50 and 7 percent. As to whether the automotive

jobbers stood by and let the chain stores get all these prices without trying to get anything for themselves, it certainly affected that business and affected ours and other manufacturers who were pursuing the policy of selling only to jobbers (2012, 2013).

On one or two occasions we quoted prices lower than our published prices or published discounts. Our company during that period made some of these so-called substandard or second grade tire chains. They differed from our regular tire chains in specifications, cross chains and lighter weight of material and probably finish. I think there was some difference in finish. We sold those cheaper than our regular tire chains. The differential in price was probably 30 or 40 per cent (2013). 3110

As to what we used those substandard or second-grade chains for, we tried to place our jobber in a position to offer something to compete with this chain store competition by giving him a lower priced chain to sell to his normal channel, to the dealer (2013, 2014).

As to the brand names we have used on our tire chains of various types, they have always been known as Pyrene tire chains, but we have had brand names to describe the different types. I have already talked about the Off and On, which was the patented chain. We later had a double-duty chain which was an extra heavy passenger chain. When we took on the bar-reinforced line, we used the double-duty trade name, but bar-reinforced to describe that type. We called the substandard or second-grade chains Junior 3111 (2014).

We advertise our tire chains, but not to the consumer as that term is commonly used. We advertise in the Trade Press, and in Fleet Magazines. Fleet Magazines is a magazine that goes to large fleet operators of trucks, and in that sense we may advertise to the consumer. But we do not advertise in the Saturday Evening Post, Life or Time or such magazines (2014, 2015).

3112 *George H. Boucher—For Petitioners—Direct.*

As to how we arrive at our list prices, we usually follow the leader and I think it is known that American Chain Company is the leader. They are the leader because they are the oldest company in the business. They have created a consumer acceptance by years of advertising to the consumer, and they make a quality product. So we follow their list prices. As to how we arrive at our published discounts, our discounts have been practically the same as American's for a period of years. We have followed their discounts generally, too (2015, 2016).

We receive copies of their price list and we send them copies of ours. We are a licensee of theirs on their bar-
3113 reinforced. Our list prices and discounts are on the same sheet (2016).

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As to when the Pyrene Company established its tire chain plant in Newark, I would have to answer from memory, probably around 1925. Prior to that its tire chain plant was located in Buffalo, New York. At the time that the tire chain plant was in Buffalo, the fire extinguisher plant was in Newark, New Jersey. The tire chain plant was moved from Buffalo to Newark in order to give us better supervision of the operation of the plant, a consolidation of the manufacturing operations (2019, 2020).

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We sell our tire chains all over the United States where
3114 there is a need for them. We don't sell them, many of them in Arizona. We don't limit ourselves to the local territory around Newark (2020).

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Before I came with this company in 1929, for a number of years just prior thereto, I was with a Connecticut concern known as the Fiberoid Corporation. They are now a subsidiary of the Monsanto Chemical Company. They made Pyroxolin ware and I was sales manager of the

3115

toilet ware division. That comprised combs, brushes, mirrors and what nots, commonly called ivory. Before that I was with the National Carbon Company in the Eveready Division of that Company. They sold dry cells, flashlights, batteries and radio batteries, lamps, automobile and flashlight type (2024).

These hair brushes, combs and batteries were sold f.o.b. the mill, with freight allowed to destination, the same as tire chain is now sold. Our company has a subsidiary known as C-O-Two Fire Extinguisher Company. They manufacture fire extinguishers using carbon dioxide. They go to the same class of customers as does Pyrene—the Pyrene fire extinguisher. The C-O-Two Fire Extinguisher goes to automotive jobbers too (2025).

3116

The C-O-Two fire extinguisher is sold on a delivery basis, anywhere in the United States. By that I mean that they prepay the freight to destination on shipment rather than having the customer pay it and allow it on the invoice. Occasionally we have buyers of tire chains who came to our plant and take delivery of these tire chains from us in their own trucks (2026).

As to whether we have any objection to selling buyers who come to our plant and take on their own trucks, we only sell those customers that are on our books, that are legitimate regular customers of ours. They can come to the plant and pick up chains any time they desire (2026, 2027).

We deliver tire chains to nearby customers in the New York City metropolitan area usually the cheapest way, and that probably would be via a common carrier, trucks rather than rail. The customer pays the truck man if it is less than freight allowed quantity. He pays the truck man in any event, and if it is freight allowed quantity, we pay the freight (2027).

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Cross-examination by Mr. Steinhauer.

I stated that as far as the pricing of chains was concerned, and the methods we use, it has not been a matter of discussion between us and our competitors (2031).

"Q. As a matter of fact, when you want to get into that plan, you don't need any discussion. It is self-operating, isn't it? A. The history of the industry would indicate that.

"Q. Of course, you are free to change to another method if you wish? A. Yes, definitely.

"Q. But you wouldn't care to? A. I could see no advantage to that" (2031).

3119 I did not testify that if we went on an f.o.b. Newark, New Jersey basis we could get along all right ourselves. The answer was based on everybody else going on the same basis. If we made the change alone, it wouldn't be helpful. We would suffer from it (2031, 2032).

"Q. They would come into your territory, would they? A. No, just as soon as we moved away from our territory.

"Q. I thought your plant would just about take care of your own demand. A. No, we are in the City of Newark.

"Q. Yes. A. If we had to sell f.o.b. Newark, and our competitors could sell on a delivered basis——

"Q. No, no, [redacted] of you sell on f.o.b. A. That isn't the way you put it to me.

"Q. Well, I meant that. If you all went on a plant basis— A. My testimony shows it would probably be to

3120 our advantage because of our location in a particularly thickly populated area and the location of our competitors.

"Q. And you maintain this system to play along with them? A. It isn't a question of playing along with them. It is a question of remaining in business. We couldn't change as long as they are selling on a delivered basis.

"Mr. Schrimsher: They wouldn't be able to come into Newark, would they?

"The Witness: What are you talking about?

"Mr. Schrimsher: If you were selling f.o.b. Newark, I believe you testified that the New York market would take all of your production on the metropolitan area market. If all of your competitors were on an f.o.b. mill basis.

"Mr. Kittelle: If they were forced to do likewise.

"The Witness: If they were forced to do likewise, that was my testimony.

"Mr. Schrimsher: Could they come into New York and meet your price when they had the freight element to worry about?

"The Witness: Again, just how are you asking that question, on the assumption that we are all on an f.o.b. mill basis, or on the assumption that we are the only one on the f.o.b. and the other fellow on delivery? 3122

"Mr. Schrimsher: That all of you are on an f.o.b. basis.

"The Witness: They couldn't come into our back yard, but they could come, as I described, half-way, where the freight rates meet or equalize, and that would restrict them" (2032, 2033).

Cross-examination by Mr. Steinhauer resumed.

As far as we are concerned, we would benefit if you can get all the other manufacturers to go—if they all do go, we would benefit and certainly we would go. I would prefer it, as it would be beneficial to my company, if they were all on the same basis (2034). 3123

The list prices of tire chains of the same specifications are the same between all competitors. The published discounts are pretty nearly all the same. As to whether when all competitors have the same specifications it makes it easier to come to a more uniform price, I don't think that the specifications have too much bearing on the selling price.

except as you change from a standard of material to a lower standard or higher standard (2035).

If everybody is making a tire chain to a standard specification and selling at the same list price, there still might be a wide difference in the profit made by the several manufacturers, based on their cost of operations. I would say there is quite a difference in cost between some smaller manufacturers and some larger. In the case of volume and supervision, and all of the other factors that contribute to a small business and a large business, it makes a big difference (2036).

3125 *Redirect examination by Mr. Kittelle.*

When I stated in answer to Mr. Steinhauer that it would be beneficial to our company if everybody had to sell on this f.o.b. mill price basis, I was thinking about just the tire chain part of our business. That was all all were talking about. I understood his question to refer to tire chains only. Our fire extinguisher part would suffer definitely. The picture is entirely reversed on the other department (2036, 2037).

Dennis A. Merriman, called as a witness for the Petitioners, testified as follows on December 9, 1947:

3126 *Direct examination by Mr. Lawrence.*

My address is 208 South LaSalle Street, Chicago. I am Managing Director of Chain Institute, Inc. That is one of the respondents in this case. I am the Dennis A. Merriman who is an individual respondent in this case (2048).

I have been acting in the capacity I just described with the Chain Institute since, I think, July 1938. Prior to accepting that position I was Vice President and General

Manager of Sales of the American Steel and Wire Company, which is a subsidiary of the U. S. Steel Corporation. In that position I had very frequent contact with jobbers in the same field as the chain manufacturers sell. That contact was for about 47 years (2048, 2049).

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As to the functions that I exercised in connection with the meetings of the Institute, I arranged for hotel accommodations; arranged for—made arrangements to have them honor requests for rooms for members. Sometimes I engaged the rooms myself, and prepared an agenda for the meeting covering the various subjects that were to be discussed (2061). 3128

I presided at some of the meetings. On those occasions I did not preside I had some functions in assisting the presiding officer. I alwys sat right next to the presiding officer, and helped him, prompted him once in a while on matters that might come up. I always had several different letters on various subjects to read, and at the proper time I got up and read those. I saw to it that the agenda was carried through (2061, 2062).

Those meetings of the Chain Institute were held approximately 9 or 10 times a year—no fixed dates. We arranged for subsequent meetings at the time we had the last meeting (2062).

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As to the services the Institute rendered concerning tonnage statistics, we collected from the members monthly statistics. They sent them into us, because that was understood—long before I ever took charge, that process was in effect. We compiled those statistics, and shortly after the first of the month, as soon thereafter as the list of statistics was complete, we tabulated them all together and sent to each member the total, and his percentage of the total, but nothing else (2065). 3129

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3130 *Dennis A. Merriman—For Petitioners—Direct.*

I never was approached by any member of the Institute in a manner that would indicate that he expected me to do anything with reference to price fixing. As to whether on any occasion I heard any conversations between the members on that subject, there were conversations between the members on a great many subjects, and sometimes in reference to prices. I never heard any discussion regarding fixing of prices (2071).

Examination by Trial Examiner Ballinger.

I never heard any discussion with reference to maintenance of prices (2071, 2072).

3131

Direct examination by Mr. Lawrence resumed.

I did not exercise and did not attempt to exercise any authority or control over the prices of the members of the Institute. At the time I was originally employed to act as Managing Director of the Institute, I was not told that one of my functions would be to make inquiry, upon the advice of members, as to whether a particular price had been quoted or given—whether cut prices had been quoted or given. I think I know how these inquiries had their inception (2072, 2073).

There had been discussion in open meetings concerning various prices that might have been quoted. The mem-

3132 bers would discuss this among themselves, and for some reason, I don't exactly know, shortly afterwards a member would call me up and ask me if I would ascertain—he would say for instance, "John Jones has quoted Bill Smith a certain price," and I would telephone that manufacturer who was supposed to have made the price, get his answer, whatever it might be, and relay it to the man who made the inquiry. I mean that at times a member of the Institute would make an inquiry of me as to a price quoted by a competitor to a jobber. It may or may not have been his cus-

tomer—I don't know. The person making the inquiry would want me to telephone that manufacturer, and inquire if he had made the price. When I called the competitor I never did indicate the source of the inquiry to him. As far as my recollection goes, I generally got a definite answer. What that answer was, I can't remember. I reported back to the original inquirer (2074, 2075).

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I inquired of counsel on the subject of what could be discussed at Institute meetings, and I reported his replies, the information I got from him, to the members of the Institute. I was advised by counsel that we could discuss past transactions, but not present or future prices, and I so ad- 3134
vised the members (2083).

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I discussed with members my philosophy with reference to cutting published prices. My philosophy on that subject is that if a member discovers or ascertains that his prices in effect as published are not being maintained, that as soon as he so discovers, he should publish a new price list, and not have a published price list in effect that did not represent what he was getting for his material (2084).

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I have never had conversations with members of the Institute regarding the Pittsburgh Plus Price System of selling chain, which is referred to in Paragraph No. 9 of 3135
the amended complaint (2087).

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I have not ever seen any correspondence with a member, any member of the Chain Institute, concerning that system of selling chain. I have never had nor have I ever overheard any conversations on that system of selling chain (2087, 2088).

3136 *Dennis A. Merriman—For Petitioners—Direct.*

I have never had any correspondence nor have I ever seen any correspondence with or among the members of the Chain Institute concerning the freight equalization pricing system with reference to weldless chain, referred to in paragraph 10 of the amended complaint. I have never engaged in nor overheard any conversations with or among the members as to the pricing system concerning tire chain which consists of a price f.o.b. with freight allowed to destination, referred to in paragraph No. 11 of the amended complaint (2088).

I have never seen any correspondence with or among any of the members of the Chain Institute on that pricing
3137 system. I never had any conversation nor heard the subject discussed with reference to the weldless system (2088, 2089).

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Cross-examination by Mr. Steinhauer.

I have attended every meeting of the Institute. I don't think I have missed one. I don't know of any meetings that are held after the Institute meetings among the members. I have joined them down at the bar once or twice after the meeting. The only thing we talk about is the relative merits of scotch and bourbon, that's all. As to whether I would know about the evidence of Mr. Campbell in the record, showing that there is price fixing going on at the meetings of the Institute, there was no price fixing going
3138 on at the meetings (2102).

As to whether a group of men may have met afterwards and discussed prices, that could have happened, I suppose I could not be everywhere. I don't know of any such event (2103).

As to the time I was last called upon by one of the members to trace the conversation as to price cutting, I would say about 1941. I have no exact data on that with me, but I think that is about the time. It was not one of my

functions to attempt to stabilize the industry. I had nothing to do with that at all. I was never asked to do so. It was not part of my job (2103).

As to tracing down these rumors of price cutting and finding out what the facts were, they called me up by telephone and asked me if I could ascertain from the party, the other fellow who was supposed to have made the price, whether or not he did make the price and I reported back to them (2103).

As to whether I would know what may have happened at the meetings of the members after the regular meeting, I don't meet with the members after the adjournment of the regular meeting, because I usually run around with 3140
them to some of their rooms or my room, and associated with half a dozen or more, and there couldn't have been a full membership meeting (2104).

I do not remember anything about any meetings of the members of the Institute as to the fixing of prices. I know that there was not any regular membership meeting after the adjournment of our meeting, and therefore there could not have been any price fixing. I can say positively that there was not any regular, any full membership meeting after our regular meeting. There may have been two or three men get together in some room. I have my own opinion what that was for (2104).

"Q. If you do not know, there is no use in trying to say anything about it. As a matter of fact, Mr. Merriman, if they have any price-fixing to do, they would not be apt 3141
to do it in front of you anyway, would they?

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"Trial Examiner Ballinger: That is purely speculative as to whether or not he would be included in the meeting. The only thing is, was he in fact ever present at such a meeting, or was he ever invited to attend such a meeting.

"Mr. Steinhauer: I don't think there is any use to ask that question.

"Trial Examiner Ballinger: Or you might go further and ask him if he has ever known of any meetings of that nature or for that purpose" (2104, 2105).

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Cross-examination by Mr. Steinhauer resumed.

I have heard of prices discussed at Institute meetings with respect to past transactions. To illustrate that, some member might want to know of another member if he had quoted or sold a certain customer or jobber, if you please,
3143 at a price mentioned at the time. And the man who was asked the question would either affirm or deny it. The purpose of the question at the time was to endeavor to ascertain whether the merchants reporting these prices were telling the facts in the case, or whether they were endeavoring to secure a price concession by misrepresentation. The man who made the inquiry wanted to know if the information given to him by his customer was correct or whether it was incorrect (2106, 2107).

As to whether it was also for the purpose of ascertaining whether he was conforming to his price list, that may have been the purpose. As a matter of fact, if he was conforming to his price list, there wouldn't have been any question involved. If it were a price below that, that called for this
3144 question (2107).

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Examination by Trial Examiner Ballinger.

I think that I had personal knowledge of everything that transpired at the meetings of the Institute. I had personal knowledge of all communications that came to our office. I answered those communications or if I had the secretary answer them, I knew what was being said. It was under my direction. When members of the Institute came

to the office they came to see me. I did not talk with them frequently because they did not come very frequently, but I did talk with them every time they came there. They called me by telephone occasionally (2122, 2123).

As to whether there was any talk about present or future price fixing at any institute meeting perhaps, on one or two occasions; at the time we had in effect that method of inquiring about a certain price that came up about the meeting; if I observed there was a tendency on the part of one or two of them to get into a little hot water, so to speak, on present or future price, I admonished them to stop, and that is as far as it went (2123, 2124).

The only conversations I had were conversations in which 3146
I admonished them, and I didn't ever hesitate to do that. I made them hew to the line. Once or twice, I wouldn't say that they never went over the line. I think they did. Some of them in there might talk about, "This is our price now, maybe it is going to be higher." I would say, "Hold on, that is off the record, you have to go right back; we can talk about what happened, nothing else" (2124).

Arthur W. Hill, called as a witness for the Petitioners testified as follows on December 9, 1947:

Direct examination by Mr. Lawrence.

3147

My address is Chicago, Illinois. I am president of The Western Chain Company and have served in that capacity since 1927. The Western Chain Company is located in Chicago, Illinois. Their offices and factory are located there. There is no other factory. I have been with the company since 1927. Before that I was with a company that manufactured horseshoes and other drop forgings (2126, 2127).

Western Chain now manufactures tire chains, welded chain and weldless chain. In 1927 when I first became connected with the company they were making only tire chains. They first began to make welded chain in 1930, I think. They first began to make weldless chain in 1945. We sold weldless chain from about 1930—about the same time we started manufacturing welded chain. We purchased it from other manufacturers. It was a very insignificant item. It was only handled for the reason that our welded chain customers would, in placing their orders for welded chain, want some small item or two of the weldless line, and in order to fill their orders completely, we would purchase
3149 that from some other manufacturer (2127).

Our purchases of weldless chain were made at various times from everybody in the industry that made it. Our company was first organized in September, 1921. In the very beginning the company were assemblers of tire chains. We bought the various parts and assembled them. By 1927 when I came with the company, they were manufacturing the chain complete, but our capacity was so small that we still purchased a large amount of parts for tire chains (2127, 2128).

When we first started manufacturing commercial welded chain we sold it f.o.b. Pittsburgh basis. As to why that method of selling was adopted by us, we found that that was the method under which welded chain was being sold, the only method it was being sold, and we saw no reason
3150 for changing it. After we began to manufacture welded chain, we still continued to buy items of welded chain from other manufacturers. Our line was not complete, and we purchased items that we didn't make from other manufacturers in much the same way that we purchased the weldless chain. That still remain true today. There are some items we still don't make (2128, 2129).

We buy from other manufacturers. At the time we adopted the f.o.b. Pittsburgh system on welded chain we did not discuss such adoption with any of our competitors.

As a matter of fact, we were not acquainted with our competitors at that time. We have not at any time discussed that with our competitors. I attended meetings of the Institute from the time it was formed, roughly. I know it was formed at the time the N.R.A. was in effect, when it started (2129).

That was about 1933. I attended Institute meetings quite regularly. I attended most of the meetings; missed only a few. If there had been any discussion of the subject of adoption of f.o.b. Pittsburgh for welded chain I would have heard it at those meetings. There never was any such discussion (2130).

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Examination by Trial Examiner Ballinger.

I would have heard it if it had occurred when I was present. I was at almost all the meetings (2130).

Direct examination by Mr. Lawrence resumed.

I would say that I missed as many as a half dozen meetings during all the years. I missed maybe one or two a year. There have been members of the chain industry selling welded chain that have substituted another method of selling for the Pittsburgh plus method in the past several years. There is the S. G. Taylor Chain Company at Hammond, Indiana. They did that about a year and a half, possibly two years ago, I believe. There is the Peerless 3153
Chain Company at Winona, Minnesota. They commenced that less than a year ago I believe (2130, 2131).

Examination by Trial Examiner Ballinger.

The Taylor Chain Company sells f.o.b. Hammond, Indiana; Peerless sells f.o.b. Winona, Minnesota (2131).

Direct examination by Mr. Lawrence resumed.

Only in specific instances do we make any attempt in selling f.o.b. Pittsburgh to meet the competition of these two manufacturers, particularly in the city of Chicago, Illinois, almost entirely. To compete with them, we sell in that instance f.o.b. our factory, plus a drayage charge which roughly meets the competition of the Taylor Company (2131).

At the present time the demand for chains is very much greater than the supply (2132).

Where we have run into competition from Taylor or Peerless, and we wanted the business, we have met their
3155 competition. We expect to continue to do so. We are free, if we want to, to change from the Pittsburgh-plus method of selling at any time. We have no understandings of any kind that would require us to adhere to the Pittsburgh-plus system. In determining what freight rates to use on welded chain, we make use of the Climax Service. They are located in Chicago, Illinois. They approached us on using their services (2132, 2133).

Examination by Trial Examiner Ballinger.

The Climax Service is a freight rate service. They compile freight rates upon request, tell you what the rates are to any point (2133).

3156 *Direct examination by Mr. Lawrence resumed.*

We have been using Climax for possibly ten years. We have used other services during those ten years. At one time we had a part-time freight man who furnished a great many of our rates, all of our rates during that particular time. We also get the freight rates quoted to us direct from the railroads, and, of course, when it was correct, be-

fore all the freight rates began to change, we used the Donnelly rates and the Pittsburgh on welded chain. We never used the Donnelly Service exclusively on welded chain. There are many points that we ship to that are not shown in Donnelly's service. On those points we would get the rates either in one of the ways I have described, either through our part-time rate man, through the direct quotations from the railroad, or through Climax. We never agreed with anybody to use the Donnelly Freight Service (2134).

The Donnelly Freight Service was quite helpful at the time it came out (2134).

I don't know whether or not any of our competitors use 3158
the Donnelly Service at this time or not. I don't see how they could with all the changes that have been made in freight rates in the last two years. I understand that two of our competitors use the Climax Service. I have not discussed their use of that service with them (2135).

I stated that we started to manufacture weldless chain first in 1945 but that we sold it from about 1930. Until we first began to manufacture weldless chain we sold it f.o.b. the nearest point of manufacture to the point to which it was being shipped. Generally these points of manufacture were Cleveland or Cincinnati. It may have been York on some occasions. I don't believe it ever was Bridgeport for the reason that we don't sell in that territory (2135, 2136).

We bought weldless chain on the basis of f.o.b. Cleveland, 3159
which was the nearest one of the points of manufacture to Chicago. We sold it on the basis of f.o.b. Cleveland or Cincinnati, whatever was the nearest point to the point at which our customer was located (2136).

We did not, prior to the time that we began to manufacture weldless chain, really solicit customers. It was something that we couldn't avoid without telling a customer not to put some little item on his orders. We were afraid if we did that, he would buy the whole order from somebody

he could get the whole line from. So we took the other course of trying to purchase that item that was on his order, so that we would fill his order complete, and not have to tell him that we couldn't furnish some small item or two that he was interested in (2136, 2137).

We sell pump or well chain of the type made by the Cincinnati Pump Company (2138).

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In selling that pump or well chain we equalize with Cincinnati. As to why we have used the method of selling weldless chain, I am not sure that I understand. Before we manufactured it, those were the terms we purchased it
3161 under, and those were the terms that all other manufacturers, as far as we can determine, were selling it. We found those were the terms generally used in the industry, and those were the terms under which we ourselves purchased it from other manufacturers (2139).

The customer would sometimes write the terms on the order himself. They wanted to make sure that they had the nearest point of manufacture, which they, of course, knew. If it were Cincinnati, they would write on the order, f.o.b. Cincinnati. At the time before we began to manufacture weldless chain, it was a very insignificant part of our business. I have never heard nor ever had any discussion with any of our competitors with regard to the method of selling weldless chain (2139, 2140).

3162 We sell our weldless chain that we manufacture today, f.o.b. Chicago, and we equalize freight with other producing points on the items that we manufacture (2140).

By Mr. Steinhauer.

We equalize with Cleveland, York, and Cincinnati, according to the items they make; all manufacturers don't make all the same items. Generally, it is f.o.b. Cleveland, York, or Cincinnati (2140).

Direct examination by Mr. Lawrence resumed.

Practically everything we sell today is equalized with one or another of these points. Our published price list states how we sell our weldless chain. It states that it is f.o.b. Chicago on such items as well as saying we manufacture (2141).

"Mr. Steinhauer (interposing): Freight equalized?
"The Witness: Yes" (2141).

Direct examination by Mr. Lawrence resumed.

As to why, when we began to manufacture chain, we 3164
adopted an f.o.b. Chicago pricing system, weldless chain has been sold always, as far as I know, f.o.b. the point of production. We wanted to definitely stamp in the minds of our customers that we were now producers of this item. We thought that was advantageous to us in selling the item. We gave the name of our weldless chain "Defiance". It is the same as American's "Tenso" (2141).

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Before we decided to manufacture weldless chain we did not ever discuss that with any of our competitors. As a matter of fact, nobody knew we were making it (2142).

We have never tried to publish a price higher than our competitors for our weldless chain. We would not be able to sell any goods if we did (2142). 3165

"Trial Examiner Ballinger: The question is, have you?
"The Witness: No, we have not" (2142).

Direct examination by Mr. Lawrence resumed.

As to my opinion as to what would happen if we tried to, we would not be able— nobody that has any business

sense at all would buy our merchandise at a higher price than somebody else's. There is no difference in the item, no difference in the quality. It would be just impossible to sell something at a higher price than somebody else asked for it (2143, 2144).

I found that tire chains were being sold by our company on the delivered-price basis at the time I first became affiliated with it in 1927. When I first took the position that I now hold there, naturally I had to investigate and see how they were selling their merchandise. My best knowledge is that from the very time of the inception, that it was sold on a delivered-price basis. I have at all
3167 times since becoming associated with the company used this delivered-price basis (2144, 2145).

Examination by Trial Examiner Ballinger.

That covers a period of twenty years (2145).

Direct examination by Mr. Lawrence resumed.

I never discussed the use of that system with any of my competitors. Not at any time since I have been with my company (2145).

At this time we do not have any warehouses. At one time we did have warehouse stocks. Before the war we had a large number of stocks located in all parts of the
3168 United States (2145).

By Mr. Steinhauer.

On tire chains (2145).

Direct examination by Mr. Lawrence resumed.

We had warehouse stocks at Minneapolis, Omaha, Kansas City, Denver, Seattle, Dallas, Oklahoma City, Atlanta,

Pittsburgh, Philadelphia, Boston, New York City and Rochester, New York (2146).

These warehouses which had stocks were public warehouses. We billed our tire chains out of these warehouses f.o.b. warehouse with no freight allowance (2146).

The customer would pay the transportation from the warehouse (2146).

By Mr. Steinhauer.

As to whether that is still the practice today, today we no longer have warehouses (2146).

Direct examination by Mr. Lawrence resumed 3170

There were occasional instances where we made the delivery from a warehouse for our own convenience. In those instances, we billed the same as though we would have shipped it from the factory. In those isolated cases, we would allow the freight, because the shipment was made for our convenience, and not the convenience of the customer. To my knowledge, other tire chain manufacturers do not, have not used that system. They have allowed the freight from the warehouses. They all use our general system for selling tire chain, a delivered-price system (2146, 2147).

The matter of quantity does enter into whether we allow freight. The quantity on which we allow freight has varied 3171
over the years; dating back many years, I believe our freight allowance was on 150 pounds or more. That was not a good package quantity, and we increased the quantity necessary for freight allowance to 200 pounds, which was sufficient for our smallest shipping container. We found, however, that the customers were a little confused. They didn't know exactly what it took to make 200 pounds, so then we changed over to a system of allowing freight on

12 pairs or more. That gave us the package quantity, and it made it very simple for the customer to determine what he needed for freight allowance. That is 12 pairs of passenger car chains or equivalent (2147, 2148).

We continued with that for quite a while, and more recently we have increased that to 24 pairs, or equivalent. Our reason for increasing that is due to the packaging problems; we are very busy, packaging is expensive today, and we use larger packages. That is still the standard size package that we use (2148).

At these various times that I testified to that point that the quantities were changed as to which we will allow
3173 freight, we did not discuss the matter of quantity with any of our competitors. I have never discussed that feature nor ever overheard our competitors discussing it. It has been entirely within our own discretion (2148).

We have not and I have not at any time had any discussion with our competitors or overheard any discussion among our competitors as to this delivered-price method of selling tire chain (2148, 2149).

We do not package our chain in the same fashion that our competitors do. Almost all of our competitors pack their chain in bags. All our passenger car chains are packed in cartons. Sometimes that makes our freight problems different from theirs, because it is very difficult to pack a shipping case with cartons without filling the case to capacity of all the cartons it will hold (2149).

3174 We are certainly free to change our method of selling tire chains, if we consider it advantageous to us. We have never given any consideration to using any other method than the delivered-pricing method, for the reason that this has been very satisfactory to our customers who purchase almost all of their other items of accessories and parts on a delivered basis, and it would be very confusing to them. They are accustomed to using catalog sheets which they assemble into a big book of their own. They do not print

their own catalogs. It eliminates an awful lot of arithmetic in arriving at what their delivered cost would be (2149, 2150).

We supply them with catalog sheets. They have a big catalog, some of the larger ones [indicating a catalog about two feet thick]. That catalog is composed of catalog sheets of manufacturers of all the items they make. The catalog sheets are price lists. As to whether our jobbers have indicated to us that they prefer that method, the jobbers insist on buying under that method. They take it for granted that any price that is quoted in the automotive industry is with freight allowed, because that is practically the only way they buy any automotive items. That has been true 3176
as long as I can remember (2150).

Our published prices on tire chain have not always been exactly the same as our competitors. Years ago—up until the start of the war, I believe, there was a very large number of tire sizes. The tire sizes were being standardized. There were the old cord tires with large diameters, and over the years the diameters of the rims and also the diameters of the tires changed, and at one time there were over 40 different sizes of passenger car tires (2150, 2151).

As a small manufacturer selling largely to small jobbers, that was quite burdensome to make a chain to fit every tire size. It would mean a much larger stock than our customers could afford to carry in order to carry a representative stock (2151).

To get around that situation, we grouped our tire sizes, 3177
six or eight different tire sizes would fit one chain size. That method was different than other manufacturers, and resulted in us having a different price, for the reason that they had a different price for each of a much larger number of sizes (2151).

We consolidated them. We had probably six or eight different chain sizes against probably three times that many

that the other manufacturers used. I have been referring to tire sizes of passenger cars (2151, 2152).

We advertise our tire chains in trade journals and trade papers (2152).

I stated that we used one tire chain to cover several tire sizes, as contrasted to many of our competitors using many more tire chain sizes to cover those tire sizes (2152).

"Q. How did that problem cease to exist? How did your prices tend to become more uniform? Was it through any discussion with any of your competitors? A. No, it was not. It was through an evolution of the tire sizes themselves. The cars became more standardized in the sizes
3179 of tires they used, and these old sizes gradually became obsolete, so today there is comparatively few numbers of passenger car tire sizes to fit all cars" (2152).

When we advertise we use the media of trade journals, reaching dealers and jobbers. We do no consumer advertising. In the past the price of our product has reflected the lack of consumer advertising. It's resulted in us having to use the larger discount to offset the advantages of the larger manufacturers who had a nationally-advertised product and one that was well known to the consumer as well as to the trade (2152, 2153).

As to the extent, percentagewise, of that differential, our price in periods early in the time that I came with the company was 10 per cent better than those of the largest manufacturers. During NRA that was narrowed to 5 per
3180 cent. That continued for a period of time after NRA; in fact, up until the time of the war. Since then the demand has greatly increased in relation to the supply, and also over all this period of years we have gained a greater acceptance of our product. We are much older in business than we used to be, we are a little better known now with customers. I am not talking about jobbers now (2153).

We have gotten some advertising in that respect—it gradually builds up over a period of years. You get better

known. As to the difference in the price that we can demand for our product today compared with the price of those who nationally advertise direct with the customer, under different conditions of supply and demand we might still have to do something to offset the great amount of advertising done by the large manufacturers. That is not true today except in special instances. As to the way this differential reflected itself, it was on the published discount sheet for a great many years. There were also discounts in addition to those, off-list discounts (2154).

We do not make or sell bar-reinforced tire chain of the type that is covered by the American Chain and Cable Company's patents. We have never had a license on that. 3182
We have a competing item, which we manufacture and sell extensively. As to other manufacturers who have a competing item, Peerless Chain Company has one, Cleveland Chain and Manufacturing Company has one and International Chain Company has one. The International is a different type but it serves the same purpose. It is lug-reinforced rather than bar-reinforced; it is competitive with the same type of chain. Today, we do not use our patented cross chain on these reinforced tire chains. We use the product of the Peerless Chain Company, and have done so since the start of the war (2155, 2156).

* * * * * *

I am acquainted with Mr. Dennis Merriman. He never exercised nor sought to exercise any authority or control 3183
over our prices. To my knowledge he has never sought to exercise any control over the prices of our competitors in any way at all. It is not a part of his job (2166, 2167).

"Trial Examiner Ballinger: Has he ever made any suggestions with reference to future prices?

"The Witness: No, he hasn't, any more than these talks from time to time, merely his personal philosophy

on proper, sensible way to run a business. There has been no suggestion of price of any kind whatever, from Mr. Merriman or any other source (2167).

Direct examination by Mr. Lawrence resumed.

I was present at times when he expounded his philosophy on price. He had quite a philosophy. He thought that anybody that published a price should adhere to that price, and when they did not any longer care to adhere to that price, why didn't they publish another price? That was his theory. He didn't like secretive discounts. He says that
3185 everybody knows all about them anyway, which is true, of course, and that just promotes ill-will (2167, 2168).

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Western Chain has bid on Navy contracts. We bid either immediately before or during the time we were in the last war. At that time the Navy generally bought welded chain, usually with hot galvanized finish. We did not at that time have galvanizing facilities in our own plant. We would get it done through the commercial galvanizers. When we bid on a Navy contract for galvanized chain we arrived at our bid price by getting quotations from the galvanizers as to what their charge to us would be for the galvanizing. We would take the price that we would otherwise charge for the job and add the galvanizing cost to it, plus some amount for the additional handling, and the price so arrived
3186 at would be the price that we would bid (2170, 2171).

As to whether there was a difference between the cost of galvanizing to those manufacturers who galvanized their own and what we had to pay when we went out to a commercial galvanizer, I presume there would be. I have no way of knowing what their costs were, of course (2171).

We had another method of arriving at a price to bid on Navy contracts, other than taking our price, galvanizing

3187

charge, plus a handling charge. We always made it a point to get a tabulation of all the bidders on every quotation or bid that we made to the government. In that way we would always know what the low prices were bid to the government, and when the next inquiry came out, if we needed the business and wanted to be sure to get it, we just would quote a price a little bit lower than the last price they bought it at (2171, 2172).

We made bids on the procurement division of the Treasury Department's contract for tire chains. We quoted our regular prices on that. As to why we sometimes went below our published prices on Navy contracts and yet stuck to our published prices on procurement contracts, the pro- 3188
curement contract was always a very indefinite thing. The quantities were not specified. You wouldn't know how much of an order you would get at any one time, whether it would be a carload, less than carload, even parcel post. You might have one pair that would go to a forest ranger up in the mountains at some very distant point. You would have problems affecting delivery to that point. Also, you had no way of knowing at what time of the year they would purchase this material. They might, for instance, buy a large quantity of material right at a time when you were in the middle of your season with a lot of snowstorms. You would have no way of determining whether you would be very well able to take care of it, and how much it would interfere with the general sale of chains to our regular customers (2172). 3189

We did not particularly want that business. We made the bid because we wanted to keep on their list, so that if other types of chain came up, we would receive the inquiry (2173).

Direct examination by Mr. Kittelle.

Our company is now Western Chain Company rather than Western Chain Products Company. There has been a change in organization over the years. That was in 1942. Prior to that it was Western Chain Products Company (2173).

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I spoke of a drayage charge where we sold welded chain in the City of Chicago and we were meeting the competition of the Taylor Chain Company at Hammond, Indiana. That drayage charge is the cost of delivering it to customers in the Chicago area from our factory in Chicago. 3191 We do not charge exactly the amount of the drayage costs. We arrive at a round figure of 25 cents per 100 pounds. Anybody in the Chicago area pays our price plus 25 cents per 100 pounds and gets it at the same price, no matter where in the city they are located (2185, 2186).

As to the comparison of that delivered price in Chicago with the delivered price of Taylor Chain Company who ship from Hammond, Indiana to Chicago, the cost of that delivery to Chicago has undoubtedly undergone recent changes due to changes in the costs of trucking, but I think it is substantially the same amount (2186).

As to the comparison of cost to get it up from Hammond to Chicago with the cost to ship it around the city, there isn't a great deal of difference. Hammond is located about 3192 18 or 20 miles from the extreme limit of Chicago, and Chicago occupies a very large territory; and we have a lot of deliveries to make on a local basis all over town (2186).

When we were not manufacturing weldless chain, but were buying it, I stated that we bought it on the basis of F.O.B. Cleveland. By the time we got it into our plant, we had paid freight from Cleveland to Chicago on it. Actually we had paid the manufacturer's price plus the freight

from Cleveland to Chicago, less a courtesy discount (2186, 2187).

When we resold it, we resold it, F.O.B. Cleveland, or in some cases F.O.B. Cincinnati, if that was closer to the buyer. We were out of pocket the Cleveland freight. We almost always had to make freight absorption to meet F.O.B. Cleveland or Cincinnati, and in addition to that we had already paid the freight from Cleveland (2187).

I do not recall that we ever shipped into the York territory. There might have been some case we did (2187).

"Q. If you shipped from Chicago to some place in the York territory, let's suppose you shipped to York itself, the customer would buy it at your list price, and he would 3194
pay the freight from Chicago to York, and then you would give him a freight allowance of the freight from Chicago to York. A. We do have to equalize from York to quite a few points. I am sorry, I think I misunderstood the question" (2187, 2188).

On that situation we get our list price for the merchandise, where the customer buys in York. We have paid the list price plus the Cleveland freight, Cleveland-Chicago (2188).

If we make a sale in the City of York we have made an allowance of the freight from Chicago to York. We would lose a lot of money on the freight. It would be impossible to make money on the freight where we were making the sales of weldless chain that we had not manufactured but 3195
had bought from others (2188).

The best we could hope for would be to break even on sales in the City of Chicago itself, and that class of chain we sold very little of in Chicago. It was almost all sold in the southern territory. When we started making weldless chain in Chicago we started to sell it F.O.B. Chicago, and started to make Chicago a basing point for that purpose. We equalize with the other places of manufacture (2188, 2189).

* * * * * *

3196 *Arthur W. Hill—For Petitioners—Direct.*

Direct examination by Mr. Duncan.

We have about three or four times as many employees at the present time as we had in 1927. I would say that the volume of our business at present as compared with 1927 is at least four or five times as much (2190).

• • • • • • •

"Mr. Steinhauer: There will be no cross examination of Mr. Hill" (2196).

3197 FREDERICK S. DUNCAN, recalled as a witness for the Petitioners, testified as follows on December 10, 1947 and January 12, 1948:

Direct examination by Mr. Kittelle.

I am the same Frederick S. Duncan who testified previously in these proceedings (2196).

• • • • • • •

As to the reasons why the Weed Chain Tire Grip Company in 1905 adopted as its plan of merchandising, this method of delivery at a uniform price on the basis of quoting f.o.b. factory with freight allowed to destination, first, as I previously stated, this method of merchandising was
3198 considered by the Weed Chain Tire Grip Company, and by Mr. Edmunds, the representative of the Parsons Non-Skid Company, the owner of the Parsons patent on tire chains, at the conference had at my office in 1905, to be the method of merchandising that they considered the most desirable as permitting a small company to get widespread distribution of this new product, the tire chain, outside of the narrow locality where it was manufacturing and previously selling. They decided that they must necessarily

work through wholesalers, or jobbers, or manufacturers' sales representatives, and in order to get the desired national distribution that was their ambition to bring about, and for that reason, having in mind that they wanted to make this product known throughout the country, particularly in districts that were more likely to have ice and require the anti-skidding devices, they felt that a uniform price should be named that would be known to their customers everywhere, known to the jobbers and distributors everywhere, so that the country at large would know that they could get this anti-skid device at a given price, and their ambition was to make it a low price everywhere, so that there would be no confusion and no recriminations 3200
about price throughout the country. That was the first reason that they decided that it was the desirable, and, in fact, necessary method for them to pursue to accomplish their desire of enlarging their business—and that, I pointed out before (2213, 2214).

But the second, and a controlling reason, was that, as I have just stated, because they were a small company, with a capital only of $10,000, they had to deal through jobbers and distributors and manufacturers' sales representatives, and all of those concerns working in the automotive accessory field bought entirely at that time on the basis of a uniform price delivered at the place of business of the distributor, with freight allowed or prepaid by the manufacturer from the factory. They had no choice, they couldn't 3201
have done otherwise (2215).

I became familiar with that practice during that early period, when I was watching the progress of the Weed Company as the representatives of the Parsons Non-Skid Company. They worked once, or at a very early date, through such distributors or manufacturers' sales agents as the Motor Equipment Company, the United Manufacturers in New York, Petrie and Cassidy in Philadelphia,

the Frank E. Sparks Company in Chicago, Beckley Ralston in Chicago, Chanslor and Lyon on the Pacific Coast, and Hughson and Merton in San Francisco, all of whom traveled a number of states, all of whom issued catalogues that were circulated by their salesmen and by mail through a large territory, and in which they always published the price at which the articles illustrated and described there could be bought in the various states. And it was their uniform practice and their requirement that they should know at what price they could get the article that they were going to handle, delivered at their own places of business in these various states, and that was an essential require-
3203 ment, which the Weed Chain Tire Grip Company was agreeable to accept because it fell right into their own belief as to the proper and only successful way in which they could enlarge the small business which they had at that time (2215, 2216).

"Trial Examiner Ballinger: That is essential to national advertising, is it not?

"The Witness: And part of their ambition, as I stated before, was that they would start in at once with a national advertising plan, which they did, in the Horseless Age, and in Motor, and later in the Chilton line of publications, and, as was testified before, in the Saturday Evening Post for now some 39 years, where they have been continuously advertising.
3204 And it was because at that early date they had that vision of a national distribution, that they had to deal through national distributors and had to follow the methods that were recognized and insisted upon by them from the concerns with whom they were doing business" (2216).

* * * * * *

Cross-examination by Mr. Steinhauer.

The Parsons Company and the Weed Company were two separate companies altogether. The Parsons Company was a British Company. The Weed Chain Tire Grip Company was the original American company, that got an exclusive license under the Parsons American patent owned by the British company. Later, the Weed Company became the American Chain Company, and still later, American Chain and Cable Company (2225, 2226).

The Parsons Company did not operate in the United States at all. They simply granted an exclusive license to the Weed Company. The Parsons Company operated in 3206
England for a time. It was not successful, because it didn't know how to market its tire chains in England. It was later acquired by the American Chain and Cable Company, and is now being run as the Parsons Chain Company in England (2226).

It is the purport of my testimony that they decided they could not do otherwise than to have an absolutely uniform price level everywhere they sold. That was the requirement of the manufacturers' agents and the wholesalers and jobbers with whom the Weed Company had to deal at the commencement of their business. As to whether it was at the insistence of the consumer, I didn't contact the consumer. I am not an economist, but the consumer—well, the consumer always prefers a fixed price, so that they know what they have to pay for an article, instead of having different jobbers, different dealers, asking different prices in different parts of the country, or in different parts of the same locality (2226, 2227). 3207

As to whether I think that a customer would like to be able to shop around and get the lowest price, I think the customers like to know they are getting a fair price, and a uniform price, and not being held up by one concern, where somebody else would sell them at a difference price.

As to how he knows whether he is being held up or not, this is only because I am a customer myself. It is my own reaction. If I should hear that somebody else was selling something at a lower price than I was being charged by a dealer with whom I have been operating, I would be very indignant at that dealer. If I found that the manufacturer had recommended a price of five dollars for an article, and somebody was charging me six dollars for it, I would be very indignant about it. I would want to go to the man who was following the suggested price of the manufacturer (2227, 2228).

"Q. That is to say, if you had an opportunity of buying
3209 an article for five dollars at one place, and the same article another place for six dollars, which was the maintained price, that you would prefer to buy it at the six dollar place? A. No, if I knew the manufacturer's recommended price was five dollars, I would be indignant at the man who took me unawares and charged me six dollars.

"Q. But that is not my question. Suppose the maintained price was six dollars and there was a cut price of five for the same article, what would be your reaction to that? A. My reaction is that I would suspect the man who cut the price of having some ulterior motive.

"Q. And you wouldn't purchase the article there? A. I would suspect whether he was giving me the genuine article for that price, or whether he was trying to work in some other goods on me, on the basis of the cut price"
3210 (2227, 2228).

I would not be interested in purchasing the article for five dollars unless it was the same one. Naturally, you want to pay the least possible, if you know it is the identical article. As to whether the consumer would be interested in price, the consumer wants a reasonable price, and to know that he is not being asked different prices by different dealers in the same or different localities (2228, 2229).

"Q. We are assuming, now, Mr. Duncan, that you have a standard price, and somebody cuts it. We are not talking about whether the consumer knows if it is a fair price or not. He is going to buy at the least price possible. Isn't that true, considering that the articles are exactly the same. A. I don't know from your hypothetical question how a consumer would know this. If he knows the same article can be obtained in two places—identical article—for different prices, he would naturally buy where he can get it the cheapest" (2229).

Redirect examination by Mr. Kittelle.

I testified that one of the objects of the Weed Chain Tire 3212
Grip Company in 1905 was to try to market this new product in large volume over the entire United States. They picked this method of selling in order to achieve that objective. What I testified to in the first session was that their plan was to sell the article so cheap and make it of such good quality that every automobile in this country had to have a pair of weed grips (2229, 2230).

As to whether they could have achieved the low price if they had not tried to sell nationally, but had restricted themselves locally to the New York market, that was the very reason Mr. Edmunds gave them an exclusive license at ten cents a pair, and rejected the Pope and the Hartford Trauffelt at one dollar and at 50 cents a pair royalty, was because these people had that ambition and had this plan 3213
of merchandising, which he believed would work out, as in England the plan under which they had been merchandising had failed (2230).

In England they charged $25.00. They had a royalty of $1.00 a pair. That is what was the equivalent of one dollar a pair there, and they charged five pounds for a pair, and sold to customers direct, tried to make direct contact with customers, and the result was that they got practically no

royalty, and the device failed in England, because the price was so high. And it went on that way for a number of years, until American took over their business and put it again on the same basis that they had used in the United States (2230).

Five pounds was then worth about $25.00. By a large volume of national selling, the Weed Chain Tire Grip Company hoped to get the price down (2231).

* * * * * * *

Recross-examination by Mr. Steinhauer.

3215 As to why the company couldn't sell this chain on the Atlantic Coast at one price and on the Pacific Coast for 25 cents more, the Weed Company and Edmunds felt it was much better to have a single price throughout the country. It was a new article, against which there was some original prejudice because of supposed injury to tires, and supposed injury to roads, and they felt that national advertising should be on the basis of a single price throughout the country, and that it would be better from that angle. Now, some of the people with whom they dealt originally had agencies practically throughout the entire country, or some started at the Pacific Coast and went, I think, east of Denver, they overlapped, so that it was not feasible that there should be different prices in different localities (2231, 2232).

3216 As to why it wasn't feasible, why it isn't feasible to sell a product 25 cents higher on the Pacific Coast than on the Atlantic Coast, I don't say that as a general proposition. I am not an economist. I can't discuss that with you. What I say is at that time, because of the attitude of the manufacturers' agents who undertook to distribute these devices for them throughout the country, it was not feasible in their opinion to have different prices in different parts of the country (2232).

As to the underlying economic reasons, I wouldn't know. As to the fact that in advertising a great number of products in the United States in magazines, they have one price for east of the Mississippi and another price west of the Mississippi, on the other hand, I know that the great majority of big companies are advertising one price all over the country (2232).

You are not eliminating price competition when you do that. They tell me that, on the contrary, they are able in that way to meet competition, to increase their sales, and get business away from other people, that that is a more effective method of competing than to have different prices; that they can go after their adversaries much more effectively if they have one price (2233). 3218

As to whether that is eliminating competition when they have one price throughout the country, whether that is competing in price, I am talking about one large concern adopting that policy in order to get more business in distant territories and I say that in my discussions with large companies like the Westinghouse, or the General Motors, like General Electric with their refrigerators and washing machines, they find they can get more business away from competitors by naming a single price throughout the country than by naming different prices. I don't think that that is the only factor that enables them to get the business. I don't know all the factors. I don't think the economists themselves know all the factors. I think the business men know more about it than the economists, a good deal, because of their experience; and in different lines there are different factors that govern (2233, 2234). 3219

STIPULATED TESTIMONY OF THEODORE RUSSELL.

"IT IS STIPULATED AND AGREED, by and between counsel for the respondent John M. Russell Manufacturing Company, Inc. and counsel in support of the complaint that if Theodore Russell of Naugatuck, Connecticut, President and General Manager of the said respondent, were called by counsel for the said respondent to testify in its behalf in the above entitled proceeding, on direct examination, he would testify as follows:

"1. That he is the President and General Manager of the John M. Russell Manufacturing Company, Inc., a cor-
3221 poration having a single manufacturing plant located in a little settlement known as 'Millville' adjacent to Naugatuck, Connecticut.

"2. That, this company was founded by his father in 1904 and was incorporated in 1908 and that he commenced working in school vacation time, while still in High School about 1917 and became President of the company in 1924.

"3. That, the John M. Russell Manufacturing Company, Inc. is a very small company occupying a wooden building some 75 years old which building contains two small offices, a stockroom, a shipping room and manufacturing space approximately 40 feet by 100 feet. A picture of said manufacturing plant taken in September, 1947 is filed herewith
3222 as Exhibit 51A.

"4. That, The John M. Russell Manufacturing Company, manufactures only sash chain, safety chain, jack chain, register chain and sprocket chain. The company no longer manufactured [sic.] ladder chain and manufactures only one size of sprocket chain and one size of register chain.

"5. That Exhibits 51 H, I, J, K and L are representative samples of the types of chain manufactured by The John M. Russell Manufacturing Company and that each of these chains is a light chain of low tensile strength.

"6. That, The John M. Russell Manufacturing Company, Inc., in addition to its manufacture of chain, manufactures a line of plumbing supplies, buckles, fasteners and a large number of other small metal products.

"7. That, approximately 20 of its total of 38 employees are engaged in the manufacture of chain and that the manufacture of chain is not the sole work of any of these employees. 3224

"8. That, the company sells its chain through manufacturer's agents or commission men and has only a single salesman, Theodore Russell.

"9. That, the company does not maintain any warehouse stocks and is a very small factor in the sash and kindred chain business.

"10. That, to the best of his recollection, from about 1921 until the coming of N.R.A., The John M. Russell Manufacturing Company, Inc. sold its chain f.o.b. Naugatuck and gave a freight allowance wherever necessary to meet the price of another manufacturer.

3225

"11. That, to the best of his recollection the freight allowance which was given was up to 30c per 100 pounds on shipments of 100 pounds or over but that wherever this resulted in a price higher than a competitor's price an additional allowance was given in order to meet the competitor's price.

3226 *Stipulated Testimony of Theodore Russell.*

"12. That, if the buyer's freight was less than 30¢ per 100 pounds, he was allowed only his actual freight and if his freight was over 30¢ per 100 pounds, he was allowed 30¢ and paid the difference himself.

"13. That, during the period from 1921 to the coming of N.R.A., The John M. Russell Manufacturing Company, Inc. had the following competitors manufacturing the same types of chain: The Turner & Seymour Manufacturing Company in Torrington, Connecticut; The American Chain & Cable Company in York, Pennsylvania; The Bridgeport Chain & Manufacturing Company in Bridgeport, Connecticut; The Mattatuck Manufacturing Company in Waterbury, Connecticut; Hale Brothers in Worcester, Massachusetts; The Chain Products Company in Cleveland, Ohio; and H & O Chain Company in Norwalk, Connecticut.

3227

"14. That, throughout said period, it was attempting to sell its chain throughout the United States but its sales were small.

"15. That, with the coming of N.R.A. and the filing of prices, The John M. Russell Manufacturing Company learned of the pricing system which was being used by competitors, i.e., selling f.o.b. the point of manufacture but equalizing freight with Bridgeport, York and Cleveland, and decided that it could best promote country-wide sales by selling on the same system, i.e., f.o.b. Naugatuck with freight equalized with Bridgeport, York and Cleveland.

3228

"16. That, accordingly, The John M. Russell Manufacturing Company put out a price list dated September 1, 1933 containing this method of freight equalization and that this was the first price list put out by said company using such pricing system. A copy of said list is filed herewith as Exhibit 51B.

"17. That, the use of this system was not suggested to the John M. Russell Manufacturing Company by any other manufacturer but was adopted by said company in the belief that it would make it possible to sell its chain in competition with other manufacturers on a nation-wide basis.

"18. That, the method of freight equalization which is used by The John M. Russell Manufacturing Company is described in a stipulation which appears at 639-642 inclusive of the record in these proceedings and that in no case has it ever charged more freight on a shipment than the freight which it actually had to pay. 3230

"19. That, The John M. Russell Manufacturing Company has only one person handling its billing, i.e., Miss Dorothy Jones who makes out all of the invoices.

"20. That, The John M. Russell Manufacturing Company could not afford a freight rate service and could not get from the local freight agent the information needed to equalize freight on its invoices and, accordingly, Miss Jones did not indicate any figure for freight equalization on the invoices but left it up to the customer to take his own freight equalization, that in some cases the customer would take such equalization and in others he would not.

"21. That, in the case of sales made by the Chicago 3231
representative of The John M. Russell Manufacturing Company, this representative would indicate on the orders the amount of freight to be charged and the Company would use these figures on its billing.

"22. That, the Company never possessed or used the Donley' freight rate book.

3232 *Stipulated Testimony of Theodore Russell.*

"23. That, the Company has no cost accounting system and has no minimum fixed profit on any item, but just tries to make a profit over-all.

"24. That, the prices charged by The John M. Russell Manufacturing Company are not dictated by any of its competitors.

"25. That, The John M. Russell Manufacturing Company has, in general, followed the prices set by the American Chain Company on similar items although its increases have always lagged behind those of The American Chain
3233 Company and its prices have at times been lower.

"26. That, The John M. Russell Manufacturing Company buys Universal Chain from The Turner and Seymour Manufacturing Company, buys 'Lock Link' chain from the American Chain Company, buys sprocket chain from The Bridgeport Chain Company, and buys double jack chain in the sizes which it does not manufacture from the Hodell Chain Company, in order to fill orders of its customers and that, accordingly, it receives announcements of price changes from these companies. It has also learned of price changes made by its competitors from its sales representatives and from its customers.

"27. That, The John M. Russell Manufacturing Com-
3234 pany does not send notices of its price changes to its competitors, except to those competitors to whom it sells chain items and then only at the same time that it sends its price changes to the trade generally.

"28. That, the types of chain manufactured by the John M. Russell Manufacturing Company are standard items and could not be sold by them at a higher delivered cost than similar items manufactured by competitors and that

the company has no customers who would purchase from them at higher delivered costs than those charged by their competitors.

"29. That, unless a system of freight equalization is used, a manufacturer must make different prices for customers located nearer to the manufacturing plant of a competitor or, if the list prices and discounts of competitors are the same, must narrow his market to that area where he has a freight advantage over his competitor.

"30. That, The John M. Russell Manufacturing Company is situated between The Turner and Seymour Manufacturing Company in Torrington and the Bridgeport Chain and Manufacturing Company in Bridgeport. 3236

"31. That, The John M. Russell Manufacturing Company is so small that it must be a follower and not a leader in the Sash and Kindred chain business.

"32. That, The John M. Russell Manufacturing Company joined the Chain Institute, as a member of the Sash Chain Division only, in 1933 in order to better cooperate under the N.R.A. and in order that it might thus receive the same information as the larger companies.

"33. That, the total expenses of such membership including dues of $50.00 per year and assessment on its sales was less than $100.00 per year. 3237

"34. That, among the reasons for the John M. Russell Manufacturing Company retaining its membership in the Sash Chain Division after the N.R.A. was held unconstitutional were that it seemed to be the best way to make a united effort to combat Japanese and German competition in sash chain by obtaining a protective tariff; by rea-

son of the standardization work which was done, involving the elimination of many odd lengths and sizes; and because it furnished a way to do cooperative advertising in favor of sash chain as against substitutes therefor.

"35. That, The John M. Russell Manufacturing Company through its membership in the Sash Chain Division cooperated with other manufacturers in placing an advertisement in 'Sweet's Catalogue' promoting the sale of sash chain, something which it could not have done with its own small resources. A copy of said advertisement is filed herewith as Exhibit 51C.

3239

"36. That, The John M. Russell Manufacturing Company resigned from the Sash Chain Division of the Chain Institute in 1943 after institution of these proceedings. A copy of its letter of resignation is filed herewith as Exhibit 51D.

"37. That, the Sash and Kindred Chain Group held meetings separate and apart from the Chain Institute meetings and from the meetings of the Weldless Chain Division; that these meetings were held infrequently and were generally held on the same day or on one of the days when the Chain Institute was holding its meeting, after their meeting had concluded. Such meetings were, however, held much less frequently than the meetings of the Chain Insti-
3240 tute and no such meetings have been held for several years.

"38. That, at these meetings, among other matters, cooperative advertising to promote the use of sash chain, the best method of meeting foreign competition, labor policies and the general state of business were discussed.

"39. That, at no meeting of the Sash and Kindred Chain Group did any competitor ever tell him that he intended to increase or decrease his prices.

3241

"40. That, at no meeting of the Sash and Kindred Chain Group did he ever tell any competitor that The John M. Russell Manufacturing Company was going to increase or decrease its prices.

"41. That, the minutes of the Institute indicate that he was present at one meeting of the Institute in Chicago in 1938 and at one meeting in New York City in 1940 and that in both instances he happened to come in early for a meeting of the Sash and Kindred Chain Group and was invited to sit in at the other meeting until his meeting started; and that these are the only times when he attended a meeting of the Chain Institute.

3242

"42. That, The John M. Russell Manufacturing Company never received notices of the meetings of the Chain Institute and never received copies of the minutes of the meetings of the Chain Institute.

"43. That, The Corbin Screw Company, New Britain, Connecticut was almost always represented at meetings of the Sash and Kindred Group, rendered reports of its sales to the Institute and received composite reports of total sales of sash and kindred chain just as did the members of the Group.

"44. That, in no case has The John M. Russell Manufacturing Company ever charged more freight on a shipment than the freight which it actually had to pay.

3243

"45. That, The John M. Russell Manufacturing Company has taken out certain patents on chain and chain products all of which have expired and that a list of said patents is filed herewith as Exhibit 51F.

"46. That, the use of the uniform list price makes it much easier for a small company such as The John M.

Russell Manufacturing Company to compete with other manufacturers of chain.

"47. That, Dennis A. Merriman has never visited the plant of The John M. Russell Manufacturing Company.

"48. That, The John M. Russell Manufacturing Company has never had any business relations of any kind with Alfred P. Shirley, Floyd C. Olcott or Forrest C. Nichols or with the firm of Shirley, Olcott and Nichols.

"49. That, The John M. Russell Manufacturing Com-
3245 pany now does a greater percentage of the total Sash and Kindred Chain business of the United States than it did in 1932.

"50. That, The John M. Russell Manufacturing Company has never revealed any of the details of its business to the Chain Institute. During N.R.A. days it filed its price lists as required by law but since N.R.A. it has filed no reports whatever with the Chain Institute except a monthly report of sales which is used solely as a basis for computing dues and as a basis for making up a composite report showing total sales of chain.

"51. That, The John M. Russell Manufacturing Company has never reported any cost figures to the Chain
3246 Institute.

"52. That, The John M. Russell Manufacturing Company does not have any 'channels of distribution' and has no jobbers sales agreements.

"53. That, no representative of the Federal Trade Commission has ever called upon The John M. Russell Manufacturing Company and that no notice was given to The

John M. Russell Manufacturing Company of the intention of the Commission to bring this proceeding nor was any opportunity given to the company to explain its membership in the Sash Chain Division of the Institute prior to the institution of this proceeding.

"54. That, the only notice that The John M. Russell Manufacturing Company ever received from the Commission prior to the bringing of this proceeding was a letter asking for certain formal information which letter is attached hereto as Exhibit 51F. This letter was answered by a letter dated December 2, 1942, which is introduced herewith as Exhibit 51G. 3248

"55. That, The John M. Russell Manufacturing Company has the following competitors in the manufacture and sale of sash and kindred chain who are not parties to this proceeding; Rome Brass and Copper Company; Mattatuck Manufacturing Company; Corbin Screw Company; H & O Chain Company; Hale Brothers; and that to the best of his knowledge each of the manufacturers uses and has used freight equalization and has list prices which are in most cases identical with those of The John M. Russell Manufacturing Company.

"56. That, The John M. Russell Manufacturing Company has never made any price change at the request of a competitor, has never discussed the making of any price 3249
change with a competitor prior to putting such change into effect, and has never made any price change conditional upon the action of a competitor.

"57. That, there have been times during the period covered by the Amended Complaint herein when The John M. Russell Manufacturing Company has sold its chain products at a loss.

3250 *Stipulated Testimony of Theodore Russell.*

"IT IS FURTHER STIPULATED AND AGREED That the foregoing statement may be taken with the same force and effect as if the said Theodore Russell had appeared and had so testified at the instance and in the behalf of respondent the John M. Russell Manufacturing Company; and that the statements contained therein are subject to such objections as counsel supporting the complaint may wish to make.

"Dated this 4th day of December, 1947.

"FEDERAL TRADE COMMISSION

3251 "By /s/ K. E. STEINHAUER

"THE JOHN M. RUSSELL
MANUFACTURING COMPANY

"By /s/ NORMAN KING PARSELLS
"Its Attorney"

(2244-2255).

STIPULATED TESTIMONY OF FRANCIS H. GRIFFITHS

"IT IS STIPULATED AND AGREED by and between counsel for the respondent Turner and Seymour Manufacturing Company and counsel in support of the complaint that if Francis H. Griffiths of Litchfield, Connecticut, President of the said respondent, were called by counsel for the said respondent to testify in its behalf in the above entitled proceeding, on direct examination, he would testify as follows:

3252

"1. That his business address is Lawton Street, Torrington, Connecticut.

Stipulated Testimony of Francis H. Griffiths. 3253

"2. That he is connected with the Turner and Seymour Manufacturing Company, whose sole manufacturing plant is located on Lawton Street in Torrington, Connecticut.

"3. That he has been connected with the Turner and Seymour Manufacturing Company since 1915, holding the position of Treasurer from 1915 to August, 1924, and the position of President and General Manager from August, 1924 to the present date.

"4. That the Turner and Seymour Manufacturing Company manufactures gray iron, brass and bronze castings, upholstery nails and thumb tacks, kitchen tools, tufting buttons, escutcheon pins, sash balances, a line of plumbing supplies and certain types of small chain. 3254

"5. That the only types of chain which The Turner and Seymour Manufacturing Company produces are jack chain, safety chain, plumber's chain, sprocket chain, ladder chain, cable chain, universal chain, ship's telegraph chain, and sash chain.

"6. That all of these chains are light chains and with the exception of cable chain are made either by forming a knot in a length of wire or by stamping blanks from strip stock and folding and inserting them to form a continuous chain.

"7. That all of these types of chain are known in the trade generally under the designation 'sash and kindred chain' and are in general lighter chains than the chain referred to in the trade by the designation 'weldless chain.' 3255

"8. That The Turner and Seymour Manufacturing Company does not manufacture and never has manufactured any tire chain, tie-out chain, pound chain, pump chain, trace chain, or 'Tenso' chain.

3256 *Stipulated Testimony of Francis H. Griffiths.*

"9. That The Turner and Seymour Manufacturing Company has been in business for ninety-nine years and has been manufacturing chain for over fifty years.

"10. That some of the uses of the chains manufactured by The Turner and Seymour Manufacturing Company are as follows:

Name	*Use*
"Sash chain	For the lowering and raising of windows, in place of sash cords.
3257 "Transom chain	A sash chain used for special fixtures to fasten to the transom and the door frame.
"Ship's telegraph chain	This is a cable chain used as a connection between the handle on the bridge and the recording instruments in the engine room of ship.
"Jack's chain	Used for hanging calendars and other small items. For dog leash, earrings, small jewelry items, etc.
"Register chain	Used for regulators on fur-
3258	naces.
"Ladder chain	Used on small, light toys as a sprocket chain and also used for hanging fixtures.
"Furnace chain	Used to open and shut furnace doors, traps, dampers, etc.

"11. That when the Turner and Seymour Manufacturing Company commenced to manufacture chain about fifty years ago, it manufactured only jack, ladder and safety chain and its business in these chain was small.

"12. That it purchased the equipment of the Atlantic Chain Company in Brooklyn, New York in 1923 and moved it to Torrington. This equipment consisted of a few sash chain machines and these were operated ineffectively until 1932.

"13. That in 1932, the Turner and Seymour Manufacturing Company purchased the business of Smith and Egge in Bridgeport, Connecticut, which concern was a 3260
producer of sash chain, safety chain, jack chain, register chain, cable chain, ship's telegraph chain and universal chain.

"14. That in 1931, the total chain business of the Turner and Seymour Manufacturing Company was $20,400.00.

"15. That at the time when he (Mr. Griffiths) came with Turner and Seymour, it was selling its chain F.O.B. Torrington with a freight allowance up to 30¢ per 100 pounds on orders of 100 pounds or over. If the order was under 100 pounds, no freight allowance was given. If the customer was located near Torrington, where the freight was less than 30¢ per 100 pounds and the order was over 100 3261
pounds, the customer would pay the freight and would be given an allowance for the actual amount of freight paid. If the customer was located at a distance where the freight was 40¢ per 100 pounds, the company would give him an allowance of 30¢ per 100 pounds if the order was for 100 pounds or over, so the customer would pay the list price plus 10¢ that is, the excess of the actual freight over the freight allowance.

3262 *Stipulated Testimony of Francis H. Griffiths.*

"16. That the Turner and Seymour Manufacturing Company continued selling on this basis until after it acquired Smith and Egge in 1932.

"17. That it made no change in its method of selling when it bought the Atlantic Chain Company in 1923, at which time its production of chain was very limited.

"18. That, from 1923 to 1932, Turner and Seymour in order to sell sash chain in competition with Smith and Egge, which was located in Bridgeport, met any price made by Smith and Egge wherever it found the price was lower than its own price.

3263

"19. That when Turner and Seymour purchased Smith and Egge it discovered that Smith and Egge had been selling sash chain F.O.B. Bridgeport but had in many cases been giving a freight allowance to meet the price of a competitor located at a distance from Bridgeport. It found that Smith and Egge had no orderly system of freight equalization but met competitive prices wherever necessary.

"20. That in 1932, when Turner and Seymour purchased Smith and Egge, there were other manufacturers of sash chain in the United States as follows: The American Chain Company at York, Pennsylvania; Bridgeport Chain Company at Bridgeport, Connecticut; the Cleveland Chain Company in Cleveland, Ohio; Hodell Chain Company in Cleveland, Ohio; John M. Russell Manufacturing Company in Naugatuck, Connecticut; Corbin Screw Company in New Britain, Connecticut.

3264

"21. That, after purchasing Smith and Egge, Turner and Seymour investigated the method of pricing sash and kindred chain then in use by its competitors and discovered

that its competitors were selling chain F.O.B. their plants but were equalizing freight with York, Pennsylvania; Bridgeport, Connecticut and Cleveland, Ohio. It also discovered that the list prices of its competitors for the same items were the same. It discovered that the list prices were shown in the catalogues of the various manufacturers but that the discounts from the prices were shown in discount sheets.

"22. That, after having discovered that its competitors were equalizing freight with York, Cleveland and Bridgeport, it adopted a similar practice in order to sell its chain products on an equal footing with its competitors. 3266

"23. That, an examination of the records of Smith and Egge revealed that it had been losing business steadily and that it maintained warehouse stocks in various cities and paid the freight to those points and in that manner secured business at points where its competitors had a freight advantage.

"24. That, Turner and Seymour found that the purchasing agents of its customers and prospective customers were accustomed to buying upon a freight equalization basis, and, for that reason, it did not consider adopting any other method.

"25. That, prior to the time of adopting freight equalization, Turner and Seymour had a number of complaints 3267
from its salesmen that they were unable to sell in competition with other chain manufacturers on the 30¢ freight allowance which Turner and Seymour had been using and that, before adopting freight equalization, Turner and Seymour permitted its salesmen to give an additional freight allowance where necessary to meet the price of a competitor. For example, in 1929, in order to secure the order

for sash chain to be installed in the Merchandise Mart in Chicago, Turner and Seymour equalized freight with Chicago in which city Smith and Egge had a warehouse stock.

"26. That, the records of Turner and Seymour show that it was using freight equalization as described at pages 634-637 inclusive of the record in this case on May 22, 1933, and that such system of equalizing freight was actually adopted by the company some time in 1932.

"27. That, the change from a freight allowance to a
3269 freight equalization basis was made by Turner and Seymour without any discussion of the matter with any other chain manufacturer.

"28. That, Turner and Seymour does equalize freight with Holland, Michigan on furnace chain by reason of the fact that furnace chain is produced in Holland, Michigan by Hart and Cooley and is in competition with the furnace chain produced by Turner and Seymour.

"29. That, Turner and Seymour found other chain manufacturers delivering chain in the Metropolitan Area of New York City without any charge for freight when they entered the sash chain field and that they adopted the same method in order to make sales in that market.

3270

"30. That, during the 1930's, Turner and Seymour discovered sash chain being sold in New York City in unmarked linen bags at 85¢ a bag retail and that, in order to keep its employees working, it eliminated profit and commercial overhead and reduced its price to 85¢ a bag, whereupon the chain being sold in plain bags was reduced to 65¢ a bag and Turner and Seymour, for a period reduced its price to 65¢ a bag and manufactured and sold their

chain at a loss. It was later found that this chain packed in plain bags was being produced in Japan.

"31. That, the cost of freight equalization is averaged over the total sales of chain manufactured by Turner and Seymour and becomes part of the item of 'selling expense' which is taken into consideration in fixing prices to be charged for chain.

"32. That, in averaging freight, Turner and Seymour treats freight exactly as it does a great many other items of cost. For example, it may be manufacturing a specific order for a customer when a die breaks, requiring a new die. This is not charged against that specific customer but as part of the general overhead. 3272

"33. That, if the list prices and discounts of Turner and Seymour were the same as those of its competitors and if Turner and Seymour was required to sell all of its chain F.O.B. Torrington at a uniform F.O.B. price which would be the same to every customer wherever located, and was not allowed to equalize freight with any other point, it would have to discharge most of its chain making employees as it would only be able to sell chain in a circumscribed area, that is, an area which is nearer to its plant than the plant of any other competitor. All of its sales to the southeast would be limited to an area halfway to New Britain, Connecticut, and its sales to the northeast would be limited 3273
to a distance of about 100 miles. Its sales to the east would be eliminated and its sales to the west would be limited to a distance approximately halfway to Cleveland, Ohio. Its sales to the southwest would be limited to the distance of about halfway to York, Pennsylvania; to the northwest it could sell as far as northern New York State. In the area so restricted there is not enough volume of business in the type of chain manufactured by Turner and Seymour to keep 5% of its present chain capacity running.

3274 *Stipulated Testimony of Francis H. Griffiths.*

"34. That the following manufacturers of sash and kindred chain were not members of the Sash and Kindred Chain Group of the Weldless Chain Manufacturers Division of The Chain Institute: Corbin Screw Company, New Britain, Connecticut; H. & O Chain Company, Norwalk, Connecticut; Hale Brothers, Worcester, Massachusetts; Mattatuck Manufacturing Company, Waterbury, Connecticut; Rome Manufacturing Company, Rome, New York; and Holland Furnace Company, Holland, Michigan.

"35. That, during the period of N.R.A., Mr. Griffiths attended meetings of the Code Authority and at such meet-
3275 ings a representative of the government, one Mr. Martin, emphasized that the manufacturers must maintain the prices which they filed with the Code Authority. The government representative also requested that each manufacturer submit his ideas for elimination of unnecessary sizes and for standardization where there was any deviation between manufacturers.

"36. That, during N.R.A. days the published prices and published discounts of each manufacturer were required to be filed with the Code Authority and were public knowledge. During these times, the published prices and published discounts were uniform and any earlier differences disappeared.

3276 "37. That, Turner and Seymour received an invitation in 1933 to join the Sash and Kindred Chain Group of the Weldless Chain Division of the Institute and that it accepted such invitation in order that it might better comply with the provisions of the N.R.A., as set forth in the letter of invitation. The original letter of invitation with enclosures is filed with this stipulation as Exhibit 52A.

"38. That, subsequent to the N.R.A., Turner and Seymour continued as a member of this Sash and Kindred Chain Group.

"39. That, the meetings of the Sash and Kindred Chain Group were held separate and apart from the general meetings of the Chain Institute and separate and apart from the meetings of the Weldless Chain Division of the Chain Institute but were generally held on the same day and in the same place following the adjournment of the general meetings of the Chain Institute.

"40. That, the minutes of the general meetings of the Chain Institute reveal that over the period from May 1935 to the commencement of the present case, Mr. Griffiths attended something less than one dozen such meetings and that in such cases Mr. Griffiths arrived early for meetings of the Sash and Kindred Chain Group and some member of the Chain Institute invited him to sit down until the general Institute meeting was over. It is for that reason that his name is noted as being in attendance. 3278

"41. That at these general meetings of the Chain Institute at which Mr. Griffiths was present for a short time he heard nothing discussed which related to the type of chain manufactured by the Turner and Seymour Manufacturing Company.

3279

"42. That, the sash and kindred chain business makes up about 5% of the total business of Turner and Seymour Manufacturing Company and it has thirty-two employees working on the production of chain.

"43. That, Turner and Seymour never asked any competitor to raise its prices or promised to raise its prices if the competitor would raise its prices on chain.

3280 *Stipulated Testimony of Francis H. Griffiths.*

"44. That there have been times when The American Chain Company has advanced its prices. Thereupon, Turner and Seymour has checked its costs and found that, because of increased costs since its last prices had been put into effect, it should also increase its prices and it has followed the American Chain Company's advance.

"45. That Exhibits 1037A and 1037B introduced in evidence by the attorneys in support of the complaint, consist of two typewritten sheets indicating the discounts given by Turner and Seymour from its list prices during the period from 1934 to 1944 and that the price increases and
3281 price decreases shown in that exhibit are explained in part by increases or decreases in the costs of raw materials and labor as shown by a schedule prepared by Mr. Griffiths and filed herewith as Exhibit 52B. These changes are summarized as follows:

"On July 1, 1939, the prices of sash chain, ladder chain, sprocket chain, jack chain, #18 steel register chain, furnace chain, except #91 steel, and safety chain were reduced. This reflected a decrease in the price of ingot copper and steel.

"On July 26, 1939, there was a general increase in the price of chain. This was because Turner and Seymour found it had cut its prices too much July 1st.

3282 "July 26, 1939, to May 26, 1941, prices for chain, except bag chain, remained constant. During this period labor and material prices also remained constant.

"On May 26, 1941, there was a general price increase in all chains except bag chain. This increase was due to an increase in wages and an increase in cost of raw materials.

"The prices charged by Turner and Seymour for bag chain decreased during the period from 1934 through 1941 by reason of Japanese and other competition and rose after May, 1941, when the Japanese competition was eliminated.

"46. That Turner and Seymour had initiated upward changes in prices without prior action on the part of the American Chain Company.

"47. That, The Turner and Seymour Manufacuring Company does not exchange price lists with competitors but it does send out its price lists to those competitors who buy items of chain from it, and, similarly, it receives price 3284
lists from certain competitors from whom it purchases chain items which it does not manufacture.

"48. That, Turner and Seymour has never agreed with any chain manufacturer that it would limit its sales to any particular territory or to any type of chain.

"49. That, Turner and Seymour has never had any business relationships of any kind with Alfred P. Shirley, Floyd B. Olcott, or Forrest C. Nichols or with the firm of Shirley, Olcott and Nichols.

"50. That, Turner and Seymour Manufacturing Company now does a greater percentage of the total Sash and 3285
Kindred Chain business of the United States than it did in 1932.

"51. That, Turner and Seymour has had unprofitable periods in the sale of its chain and chain products since 1932.

"52. That, Turner and Seymour meets with continual competition to its sash and chain from sash balances, and other similar materials.

3286 *Stipulated Testimony of Francis H. Griffiths.*

"53. That there is continual competition between manufacturers of sash and kindred chain based on quality of product, service to the customer, prompt adjustment of complaints, tensile strength of chain, type of reel, business relationships, suggestions for improvement over what the customer requests, and similar matters. For example, when Turner and Seymour bought out Smith and Egge it found that company in poor shape and losing business to the American Chain Company. It immediately improved the product, put out a chain of higher tensile strength, put out a good catalogue, gave sales helps and made it easier for the customer to buy. Other manufacturers promptly
3287 followed Turner and Seymour on the weights shown in its catalogue.

"54. That, in no case, has The Turner and Seymour Manufacturing Company ever charged more freight on a shipment than the freight which it actually had to pay.

"55. That the use of uniform list prices makes it easy for the customer to compare prices of various manufacturers by merely applying the discounts to the list prices.

"56. That he has met Mr. George Campbell, now deceased, but that the International Chain Company of which Mr. Campbell was president does not manufacture and never did manufacture any products which are competitive
3288 with the products made by Turner and Seymour.

"57. That he has never met Mr. Sandstrom of F. G. Taylor Chain Company.

"58. That, Turner and Seymour buys a type of chain which it shows in its catalogue and sells under the name of 'Lion' chain from American Chain and Cable Company, and that it is buying this chain to determine whether it can

build up enough business in this type of chain to justify investing sufficient money in machinery to manufacture it for itself. If Turner and Seymour finds that it can sell enough of this chain to justify putting in machinery, it intends to do so and compete with the American Chain and Cable Company in this item.

"59. That, The Turner and Seymour Manufacturing Company did not receive notices of the general meetings of the Chain Institute and did not receive copies of the minutes of the general meetings of the Institute, except minutes of the Sash and Kindred Chain Group, which minutes are in evidence in this proceeding. 3290

"60. That, Mr. Dennis A. Merriman never visited the plant of The Turner and Seymour Manufacturing Company.

"61. That the chain comprehended in the phrase 'sash and kindred chain,' with the exception of those few types of chain which are made solely by Turner and Seymour, is a standard product.

"62. That, Turner and Seymour does not have any customer who could continue to buy from it in the case of price cutting by competitors.

"63. That, Turner and Seymour has lost customers to competitors because of their charging lower prices. 3291

"64. That, Turner and Seymour has never revealed any of the details of its business to the Chain Institute. During N.R.A. days it filed its price lists as required by law but since N.R.A. days it has filed no reports whatever with the Chain Institute except a monthly report of sales which is used solely as a basis for computing dues and as a basis of making up a composite report showing total sales of chain.

"65. That, Turner and Seymour learned of the prices charged by its competitors through the receipt of price lists from those competitors from whom it purchases items of chain, through report made to its salesmen by customers, and from reports made to it by its sales representatives.

"66. That, Turner and Seymour has never reported any cost figures to the Chain Institute.

"67. That the dues paid by members of the sash and Kindred Chain Group are only fifty dollars per year whereas the regular members of the Institute pay dues of two hundred dollars per year.

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"68. That the only members of the Sash and Kindred Chain Group who were not regular members of the Chain Institute (i.e. whose membership was limited solely to the Sash and Kindred Chain Division) were The John M. Russell Manufacturing Company and the Turner and Seymour Manufacturing Company.

"69. That, The Corbin Screw Corporation attended all meetings of this Group, received notices of all meetings and minutes of meetings of this Group, and took part in the activities of this Group to the same extent as did the members of the Group.

3294 "70. That, the Corbin Screw Corporation uses freight equalization in its sales of sash chain, ladder chain and register chain and that the prices charged by Corbin for these items are in most cases identical with the prices charged by Turner and Seymour.

"71. That from the monthly reports of shipments of chain made to the Chain Institute by the various manufacturers of sash and kindred chain the Institute made up a composite report showing total shipments of chain and

the share of the particular company to whom the composite report was sent and that there are introduced herewith as exhibits the reports made by the Chain Institute to Turner and Seymour for the months of December 1937, December, 1941, and December, 1946, which reports are typical of the monthly reports made by the Chain Institute to Turner and Seymour and to other sash and kindred chain manufacturers as listed at the bottom of such report. From these reports no manufacturer could tell the amount of chain shipped by any competing manufacturer but could only tell his own percentage of the total shipments of chain made for the month in question.

3296

"72. That what is known as 'bag chain' is #18 sash chain packed in bags.

"73. That, Turner and Seymour had no knowledge of the letter referred to in Paragraph V (3) of the Amended Complaint in this proceeding prior to the institution of this proceeding.

"74. That, Turner and Seymour does not have any 'channels of distribution.' It sells to jobbers, dealers and manufacturers who use chain as a component part of their product. All customers in the same class receive the same discount.

"75. That no representative of the Federal Trade Commission has ever called upon The Turner and Seymour Manufacturing Company and that no notice was given to The Turner and Seymour Manufacturing Company of the intention of the Commission to bring this proceeding nor was any opportunity given to the company to explain its membership in the Sash Chain Division of the Institute prior to the issuance of the Complaint herein. 3297

3298 *Stipulated Testimony of Francis H. Griffiths.*

"76. That the only notice which Turner and Seymour received from the Commission prior to the bringing of this proceeding was a letter asking for certain formal information which letter is attached hereto as Exhibit 52C. This letter was answered by a letter dated December 7, 1942, which is introduced herewith as Exhibit 52D.

"77. That, Turner and Seymour has the following competitors in the manufacture and sale of sash and kindred chain who are not parties to this proceeding: Corbin Screw Corporation, H & O Chain Company; Hale Brothers, Rome Brass and Copper Company; Mattatuck Manufacturing Company; and that each of these manufacturers uses
3299 freight equalization and has list prices which are in most cases identical with those of The Turner and Seymour Manufacturing Company.

"78. That, Turner and Seymour is free to change its prices at any time although it would naturally have to be careful about raising prices because if its competitors did not also raise their prices it would lose its customers to its competitors.

"79. That, Turner and Seymour has never discussed its method of selling, that is the use of freight equalization, with any competitor.

3300 "80. That, Turner and Seymour Manufacturing Company does not send its price lists to the McKay Company and does not receive price lists from the McKay Company.

"81. That, The Turner and Seymour Manufacturing Company has no customers which it regards as its own personal customers and that its competitors are constantly trying to take its customers away, while Turner and Seymour is constantly attempting to secure the customers of

its competitors and that both Turner and Seymour and its competitors have been successful in their efforts in certain instances.

"82. That, the Turner and Seymour Manufacturing Company sells certain types of chain to The American Chain Company, to the Cleveland Chain Company and to the John M. Russell Manufacturing Company and that these are the manufacturers to whom it sends its price lists and from whom it receives price lists but that it has never notified any of these companies or been notified by any of these companies of any impending change in the price of chain prior to the time that notice of such change has been given 3302
to the trade in general.

"83. That, in addition to co-operative advertising, the adoption of sash and kindred chain specifications, the adoption of standard lengths for register chain, and general market and labor conditions were discussed at meetings of the Sash and Kindred Chain Group.

"84. That, among the benefits received by Turner and Seymour from its membership in the Sash and Kindred Chain Division of the Chain Institute was the knowledge of how its percentage of chain sales compared with total chain sales; also the opportunity to suggest specifications for sash and kindred chain to the Federal Specifications Board in 1936 and in 1937, when said Board requested the 3303
assistance of the Institute in drawing new specifications.

"85. That, Turner and Seymour has never made any price change at the request of a competitor, has never discussed the making of any price change with a competitor prior to putting such change into effect and has never made any price change conditional upon the action of a competitor.

3304 *Stipulated Testimony of Francis H. Griffiths.*

"86. That, within the past few years a number of new manufacturers have come into the sash and kindred chain field, including Hart and Cooley in Holland, Michigan, and Rome Brass and Copper Company.

"87. That, Turner and Seymour reserves the right to ship by the cheapest method and that if a customer who is entitled to freight equalization insists on shipment by air, express, or auto truck, the shipment is made f.o.b. the plant with the customer paying the air transportation, expressage, or truckage, and that the customer is then allowed the difference between the railroad freight from Torrington and the
3305 nearest competitive point only.

"88. That in the case of shipment by water to the Pacific Coast, the only area to which Turner and Seymour ships by water, the transportation charge is equalized with Cleveland, York, or Bridgeport, by the same method of transportation.

"89. That, Turner and Seymour has purchased lock link chain, friction chain, and wire sprocket chain from The American Chain Company as an accommodation to its customers with the thought of producing these items themselves if it finds that the volume warrants the expense of new equipment.

3306 "90. That the Sash and Kindred Chain Group has held no meetings for several years and that such meetings were held only at the request of one of the members and not at regular intervals.

"91. That sash and kindred chain is highly competitive.

"92. That, filed herewith as exhibits are a specimen of #24 single jack chain, the smallest size of jack chain manu-

factured by The Turner and Seymour Manufacturing Company and a specimen of #65 sash chain, steel, copper dipped, being the largest size of sash chain manufactured by The Turner and Seymour Manufacturing Company. These exhibits serve to indicate the types of chain manufactured by The Turner and Seymour Manufacturing Company and other sash and kindred chain manufacturers.

"93. That the catalogue which is in evidence as Exhibit 1042-A, catalogue #40, shows all of the types of chain manufactured or sold by The Turner and Seymour Manufacturing Company and that the chain shown therein and denominated #80 welded steel wire chain were purchased 3308
from The American Chain and Cable Company as required by Turner and Seymour to satisfy the demands of its own customers.

"IT IS FURTHER STIPULATED AND AGREED that the foregoing statement may be taken with the same force and effect as if the said Francis H. Griffiths had appeared and has so testified at the instance and in the behalf of respondent Turner and Seymour Manufacturing Company; and that the statements contained therein are subject to such objections as counsel supporting the complaint may wish to make.

"Dated this 4th day of December 1947.

"FEDERAL TRADE COMMISSION 3309
/s/ By K. E. STEINHAUER
Attorney supporting the complaint.

"THE TURNER AND SEYMOUR
MANUFACTURING COMPANY
/s/ By NORMAN KING PARSELLS
Its Attorney" (2260-2284).

3310 *Colloquy.*

* * * * * *

"Mr. Kittelle: For the purpose of identifying these documents in the record, Respondent's Exhibit 53 is a report from the Chain Institute to Turner and Seymour Manufacturing Company, setting forth the total industry shipments of sash and kindred chain of various types for the month of December, 1937, and showing also the percentage thereof which the Turner and Seymour Manufacturing Company's shipments bore to the total industry shipment.

"Respondent's Exhibit for Identification 53-A is a similar report for the month of December, 1941, and Respond-
3311 ent's Exhibit 53-B is a similar report for the month of December, 1946.

"I might say for the record that during the testimony of a number of the witnesses here, these reports have been described. The various members of the Chain Institute send their figures in to the Chain Institute and receive back the composite industry figure for the particular type of chain concern and the particular member percentage.

"Most of the members of the Institute are very reluctant to disclose their figures on the public record, or to anyone, for fear their competitors would gain access to it. Apparently the Turner and Seymour Company does not feel that way, and they are the only ones that we have been able to get the actual copies of the reports from. The Examiner might be interested in seeing them.

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* * * * * *

"(The documents referred to, heretofore marked for identification Respondent's Exhibits 53, 53-A, and 53-B, were received in evidence)" (2285, 2286).

* * * * * *

"Mr. Kittelle: Respondent's Exhibit 54 for Identification is a memorandum dated September 22, 1947, from C. K. Marion to John E. Dizer and John Clyne. Mr.

3313

C. K. Marion, who wrote the memorandum, is an accountant in New York City, and Mr. Dizer and Mr. Clyne are his assistants.

"We retained them to make a study of the invoices which are in evidence here, the invoices of the Respondents for the month of October, 1941, in order to determine the average amount of freight allowed on all of the sales of tire chains of the Respondents during that month, in so far as the invoices would disclose that information.

"This memorandum that I have mentioned, which is part of Respondent's Exhibit 54, is Mr. Marion's instructions to his two assistants, who were to actually examine the invoices, telling them how to do it. It explains just 3314
how the examination of the invoices was conducted, and how the tabulations were made.

"The last two sheets of Respondent's Exhibit 54 are the results of this examination, as prepared by these two assistants under Mr. Marion's supervision.

"One of these sheets is labeled, 'Schedule 1,' and shows the dollar sales of tire chain as disclosed by these invoices for each of the Respondents concerned, and the dollar freight allowed by each of them, and the percentage of the freight to the sales value.

"That covers all of the Respondents.

"The other tabulation, which is entitled 'Schedule 2' gives the same information, but limits it only to those Respondents who the record shows are manufacturers of tire chain, thus eliminating such Respondents as the Bridgeport 3315
Chain and Manufacturing Company, which sells tire chain but does not manufacture it.

* * * * * *

"(The document referred to, heretofore marked Respondent's Exhibit 54 for identification, was received in evidence.)

"Mr. Kittelle: I might say for the record that this Exhibit 54, Respondent's Exhibit 54, shows that the average freight allowed on the tire chains by all of the Respondents during October, 1941, was 5.49 per cent of their total dollar sales during that month, and that is when you consider all of the Respondents who sold tire chains, whether they made them or not. The highest is the Seattle Chain & Manufacturing Company. Their percentage was 13.47. The lowest percentage was that of the Woodhouse Chain Works, which again is not a manufacturer of tire chains but merely sold them. Their percentage was .48 per cent. In other words, forty-eight one-hundredths of one per cent.

3317 "The other figures speak for themselves. They lie between the extremes with an average of 5.49.

"When you eliminate the Seattle Chain & Manufacturing Company, Bridgeport Chain & Manufacturing Company, Woodhouse Chain Works, and Round California Chain Company, none of whom made tire chains, they merely sold them, it does not alter the over-all average figure very much. It goes from 5.49 per cent up to 5.50 per cent; in other words, five and one-half per cent. . . .

"The high percentage now is Pyrene Manufacturing Company, 8.38 per cent, and the low is the St. Pierre Chain Corporation, 1.88 per cent." (2286-2289).

* * * * * *

"Mr. Kittelle: I offer Respondent's Exhibit 55-A and
3318 55-B in evidence, not as evidence in and of itself, but as a statement of counsel. I have shown it to Mr. Steinhauer. It is a comparison of the published list prices of the various Respondents on regular and substandard tire chains during the 1941 and '42 season.

"This was prepared by my associate, Mr. Hilder, from the exhibits which are in evidence in this case, and was prepared because Mr. Steinhauer, while some of the witnesses were on the stand, said he did not know whether or

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not there were exhibits in evidence to show whether these Respondents sold substandard tire chains, and if so, what their list prices were.

"So this is merely a compilation which we hope will be useful to the Examiner and the Commission. It is not in evidence, it is merely a statement of counsel.

* * * * * *

"(The pages referred to, heretofore marked Respondent's Exhibit 55-A and 55-B for Identification, were received in evidence)" (2290).

"Mr. Kittelle: Respondent's Exhibit 56-A for identification is a table which was prepared at my request by the offices of the Chain Institute in Chicago. As a matter of fact, they were prepared by the Secretary of the Institute, a gentleman by the name of Eckstrand. 3320

"The Examiner will recall that we had witnesses on the stand and asked them whether they sent their tonnage figures or shipment figures to the Institute, and received back these composite reports showing the total industry shipments and percentage.

"The witnesses testified that that was so, that they did that, and we asked a number of them how their percentage of the industry volume had varied during the last 15 years, whether up or down, or whether it stayed the same. They testified generally about that, but there were objections from Mr. Steinhauer that we ought to have a little better evidence. 3321

"We were quite as desirous as Mr. Steinhauer was of getting this better evidence, but we were faced with the objections of these Respondents to disclosing these confidential reports to anyone.

"The Examiner, I believe, suggested the customary method of sealing the certain evidence in an envelope so only seen by the attorneys for the Commission and the Examiner, and would be seen by the courts, but at least

one attorney for Respondents would have to see it in order that he could make any argument in his brief about it, and, unfortunately, they have been unable to select any attorney for the Respondents that they want to show this to.

"So, as a possible solution to this problem, I asked that Respondent's Exhibit 56-A and 56-B be prepared. They do not tell the whole story, I will be perfectly frank. You cannot do that without disclosing these confidential figures.

"These two tables are prepared so that you cannot identify any company. You do not know who is who But all the companies are listed there by designations, A, B, C, D, E, F, G, and so on down the alphabet to P.

3323 "These two tables are made up by taking each company's figures for the year 1937 and calling them a hundred, no matter what they were. That is an index number. And then whatever the figure for the particular company was in 1938, if it happened to be only 75 per cent of what it was in 1937, then the figure 75 goes down for 1938 for that company.

"In other words, it is set up on an index figure with 1937 as the index year, and every company is assigned an index figure of 100 which represents that particular company's figures for 1937.

"One of the tables is prepared by taking each company's actual shipments in tonnage during 1937, and then comparing their actual shipments in tonnage during each year thereafter up to and including 1946.

3324 "That one, I might say, is Respondent's Exhibit 56-A: that is based on a tonnage basis.

"Respondent's Exhibit 56-B for Identification is based on the individual members' percentage of the industry tonnage. In other words, if a manufacturer in 1937 enjoyed ten per cent of the chain business, he is given a figure in 1937, not of 10 per cent, but of 100. That is his base. In his case that 100 means 10 per cent. If in 1938 his per-

3325

centage of the industry volume slipped from 10 per cent to 5 per cent, his 100 index figure in 1937 would drop to 50 in 1938.

"That is the way that Respondent's Exhibit 56-A for identification is calculated.

"I am going to have to reverse myself. I got them backwards. The Examiner will notice that Respondent's Exhibit 56-B shows the industry as having an index of 100 in every single year, which, of course, it would have to, because the industry's percentage of the industry's total volume is always 100. On the other one, Respondent's Exhibit 56-A, the total industry index figure jumps up and down from year to year, because, after all, the total in- 3326
dustry tonnage, and total amount of chain sold by all these Respondents in the United States, does vary.

"This does not show which of these manufacturers is small and which is large. If you did that, it would be a dead give-away, because everybody knows the American Chain and Cable Company is the biggest one.

"As Mr. Steinhauer pointed out to me when we discussed this, you do not know whether a manufacturer around here, when his total tonnage jumps up nine times, you don't know whether it is jumping from $1,000 to $9,000, or whether it is jumping from $1 million to $9 million. That is true. The only thing it does show is that there was nothing static either about the volume of business of any of these people, or about their relative percentages of the 3327
total industry volume. There is nothing static about it at all.

"I think it does establish that fact for what it is worth. I wish we could go further, but we cannot without disclosing confidential information that these people do not want to disclose" (2291-2294).

" • • •

"Trial Examiner Ballinger: On the record. Respondent's Exhibits 56-A and 56-B for identification are admitted

in evidence for the sole purpose of tending to show that the business of each of the Respondents was not static either as to their own production or as to their relative production in the industry" (2296).

"• • • •

"STIPULATION AS TO TESTIMONY OF EDGAR LITTMAN

"It is hereby stipulated and agreed by and between the attorney supporting the complaint and the attorney for respondent Nixdorff-Krein Manufacturing Company that
3329 if EDGAR LITTMAN were called as a witness for said respondent, he would testify as follows:

"'That he is, and since 1922 has been, President of said Nixdorff-Krein Manufacturing Company; that said company was organized in about 1857, that he first came with said company in 1902 as the "boss's son" to learn the business and was subsequently made Vice President of said company for a few years prior to his becoming President in 1922 as aforesaid;

"'That said company presently manufactures chain; wagon hardware, singletrees, doubletrees and neck yokes for horses; that among the types of chain manufactured by said company is welded chain; that the witness' earliest recollection as to the method or basis on which said com-
3330 pany sold welded chain is that it was sold f.o.b. Pittsburgh (which is the basis described in Paragraph Nine of the stipulation dated July 15, 1946, which is part of the record in this proceeding); that welded chain has ever since been, and still is, sold upon said basis by said company (except that since respondent S. G. Taylor Chain Company commenced selling welded chain f.o.b. Hammond, Indiana in or about 1945 said Nixdorff-Krein Manufacturing Com-

pany has from time to time equalized freight with Hammond, Indiana on its sales of welded chain in order to meet the competition of said S. G. Taylor Chain Company); that this witness has never had or overheard any discussions or had any correspondence or communication with or among any competitor or competitors of said Nixdorff-Krein Manufacturing Company with regard to said methods of selling; that said Nixdorff-Krein Manufacturing Company uses the Donley Freight Book published by the respondent Chain Institute but also uses the services of the St. Louis Traffic Bureau as a source of information for freight rates on welded chain.

"That said Nixdorff-Krein Manufacturing Company 3332
does not manufacture and has never manufactured any weldless chain but purchases a small volume of weldless chain from its competitors from time to time in order to fill out its line and satisfy the demands of its customers; that it purchases such weldless chain from such competitors on the basis of the competitor's price plus freight from Cleveland, Ohio to St. Louis, Missouri (which is the location of the plant of the said Nixdorff-Krein Manufacturing Company), and resells such weldless chain upon the basis described in Paragraph Ten of said stipulation dated July 15, 1946, that this witness has never had or overheard any conversation, nor had any correspondence or communication, with or among any competitor or competitors of said Nixdorff-Krein Manufacturing Company with regard to
the aforesaid method of selling weldless chain. 3333

"That said Nixdorff-Krein Manufacturing Company commenced the manufacture of tire chains in the latter part of 1936 or the early part of 1937 and sells its said tire chains upon the basis described in Paragraph Eleven of said stipulation dated July 15, 1946; that this witness has never had or overheard any discussion, nor had any correspondence or communication, with any competitor or

competitors of said Nixdorff-Krein Manufacturing Company with regard to said method of selling tire chains.

"'* * *

"'Dated this 10th day of December, 1947.

"'FEDERAL TRADE COMMISSION
K. E. STEINHAUER

By /s/ Attorney supporting the complaint

"'NIXDORFF-KREIN MANUFACTURING
3335 COMPANY

By /s/ A. CHARLES LAWRENCE
its Attorney'"

(2297-2301).

FRANK A. BOND, called as a witness for the Commission testified as follows on February 9, 1948:

Direct examination by Mr. Steinhauer.

Our company does not still use the Donley freight book. You couldn't use it today, because it is not up to date. There have been a great many--you could hardly use it
3336 today because of the many changes in freight rates that have taken place in the last year, and attempted increases and rejections and suspensions and so forth (2331, 2332).

Mr. Donley is not working on a revision of that freight rate book. As to whether it is the intention of the Association to have him do so, I couldn't answer that at the moment (2332).

Examination by Trial Examiner Ballinger.

The revisions have not been confined entirely to the last year. I would say the last revision was in 1943. I brought one of the books along; it is my own (2332).

"Mr. Steinhauer: Yes, we have one here in the record.

"The Witness: Showing it up to 1943?

"Mr. Steinhauer: No, I don't remember that.

"Trial Examiner Ballinger: Have there been revisions from time to time since that book was issued?

"The Witness: In the actual freight rates by the railroads, yes, sir. This (indicating document) contains the latest, if you want to look at it, sir. 3338

"Mr. Steinhauer: Yes, I would like to see it.

"The Witness: Those are the revised sheets in there, and a few bulletins that apply. That is the last that was done to it by Donley.

"*By Mr. Steinhauer.*

"Q. Have there been many changes up to that time, that is, up to a year ago?

"Mr. Denby: Excuse me. Changes in what?

"Mr. Steinhauer: In the freight rate.

"Trial Examiner Ballinger: Are you speaking from the date of issuance? 3339

"Mr. Steinhauer: The date of the issuance of the last revision up to about a year ago.

"The Witness: Well, of course that was during the war period, and I will be frank to say my recollection is a little hazy on that. I don't believe there were a great many changes in the war period, but in the last

year or so the railroads have been attempting to make innumerable changes" (2333, 2334).

Direct examination by Mr. Steinhauer resumed.

If someone who used that book wishes to ascertain what the correct rate is today, he can get that from Mr. Donley. He would be privileged to do that, although I am quite confident that all manufacturers, the respondent manufacturers, have some service of their own. We, as an individual company, the McKay Company, do use Charles Donley because he has always been our traffic counselor. But the
3341 others can come in and call him up any time if they wish to (2334).

As to whether any company manufacturing welded chain does not use the Donley service, I couldn't of my own knowledge, say that any of them use it but the McKay Company, to the extent we do use it. I could not say that any of them do not use it (2334).

As to whether the Donley Freight Rate Book was kept up pretty well up to about a year ago and as to whether there have not been many changes from '43 up to a year ago, I am not entirely qualified to answer that. My recollection is that during the war period there were not very many freight rate changes. That is merely an opinion. I would say that the real freight rate changes occurred in the last year, year and a half (2334, 2335).

3342 I don't know whether Mr. Donley will be employed to bring that book down to date. It has not been brought up at any Institute meeting as such. From my own personal view I have an intention of bringing it up now, as a member of the Committee, Chairman of the Committee (2335).

The members can call up Mr. Donley any time and get the present freight rate. That is what we do in the McKay Company. In fact, he keeps our freight rates on all our

commodities right up to date all the time. Therefore, we do not use that book other than as a reference in quoting, or would have used it, prior to this (2335).

Examination by Trial Examiner Ballinger.

We rely on the Donley Service entirely for our freight rates, for which we pay him a monthly retainer. We have done that for the last 25 years. I mean by "we" the McKay Company (2335, 2336).

Direct examination by Mr. Steinhauer resumed.

We could not get that same service through the Institute to the same extent we get it. He keeps all our freight rates on welded and weldless and tire chains and electrodes. He keeps our entire freight rates up to date. As far as welded chain is concerned, as a member of the Institute we would be able to get these rates from Donley any time we wanted, these revisions (2336). 3344

Cross-examination by Mr. Denby.

A member of the Institute could not just call up Donley and ask him for freight rates unless he retained Mr. Donley and paid him a fee for services. As an individual company, he would not contact Donley direct. He could take it up with the Institute if it was something within the scope of what Donley was doing for the Institute on his retainer fee. Any company could get through the Institute any information they wanted pertaining to rates from Donley. For the Institute, Mr. Donley is performing other services (2337). 3345

Mr. Donley is now appearing before the Interstate Commerce Commission in respect to a number of dockets, as they call them, ICC dockets, pertaining to requests for

changes in rates, and he has filed petitions for suspension and for denial, and so forth and so on, and I have some of them here with me. Here is his latest one, Docket No. 5502, wherein he petitions for reopening, reconsideration, argument or postponement, dated January 31, 1948. It is filed on behalf of American Institute of Bolt, Nut and Rivet Manufacturers, the Chain Institute, Inc., Non-Integrated Steel Manufacturers Association, Screw Manufacturing Industry, Protestants. There is where the Chain Institute comes in, you see, as one of the protests he is making (2338).

He is protesting against a proposed freight rate which
3347 would be, in the opinion of the Institute, burdensome to the chain industry and he appears there as an expert retained by the Institute (2338, 2339).

The McKay Company retains Mr. Donley independently and has for some time, as a freight rate advisor. As to what the McKay Company does to determine the rates on welded chain from Pittsburgh which are used in our operations, I have previously stated that Donley keeps our freight rate records up to date, on all of the commodities that the McKay Company manufactures, sells and ships. In addition to that, if there are any particular rates that we want to get in a hurry, that we are not sure of, we could call Donley and get them from him. We also send to him a copy of each shipping order that covers, or carries with it, a multiple routing, that is, where more than one
3348 railroad will take care of the delivery, in order to be sure that we route it via the lowest rate that the customer would be entitled to on the joint routing (2339, 2340).

The Donley service, in so far as the information concerning rates is concerned, is asked to determine a fact. That fact would be the correct rate to the given destination from either Pittsburgh or York where our two factories are located. Copies of the 1943 revision of the rate

book were distributed to the members of the Institute (2340).

A member of the Institute is perfectly free either to use the freight rate book or not to use it. We have no authority to compel them to use it. It is merely issued as a matter of convenience if they elect to use it (2340).

Redirect examination by Mr. Steinhauer.

Whenever we want any service from Mr. Donley with reference to the rate from Pittsburgh we are entitled to call on him for them since he is our traffic manager or traffic counselor and we pay him for that. As to whether we could ask him as a member of the Institute for any rates from 3350
Pittsburgh, he would probably do that to a reasonable degree, but his per diem would not justify it. We only pay him $45 a month. The members could get that. If you asked him often, he would probably object. Provision would have to be made for higher compensation (2340, 2341).

Recross-examination by Mr. Denby.

As to the provisions in Mr. Donley's present contract with the Institute relating to furnishing of individual information to the members, he furnishes no information individually to the members whatsoever. He furnishes it to the Chain Institute. With regard to individual in- 3351
quiries the contract provides that he would handle it individually with the company, I believe, until it would reach a point where he would say, "Now listen, if you want me to do that, you will have to hire me as your freight consultant and pay me a per diem, the same as the McKay Company" (2341, 2342).

Examination by Trial Examiner Ballinger.

Donley's contract with the Institute is sufficiently broad to enable the Institute to receive any traffic information from Mr. Donley at any time it so desires, but if the Institute, upon receipt of advice from Donley that there has been, let's say, a rather broad revision of freight rates in the official territory—if we would then ask Donley to provide the Institute with copies of that, we would have to pay him extra, because that entails a lot of work. The $45 is simply to look after our interests at all times and watch if a freight advance is contemplated, if they petition for
3353 a raise on a certain product or a reclassification that he feels is detrimental to the industry. If that happens, he notifies us, and then we authorize or instruct him to take action accordingly, for which we pay him additional compensation (2342).

If a member made inquiry with reference to rates that are not covered by his contract, it would be necessary for the Institute's officers to take some action on that (2342, 2343).

In the event they approved it and requested it, he would furnish it but make an additional charge (2343).

Recross-examination by Mr. Denby resumed.

Mr. Donley, outside of this, is an independent consultant
3354 on traffic matters and freight rate matters and is like a lawyer or a doctor. I tried to bring that out by reading the various institutions or branches of industry that he represents in this one brief he has filed with the Interstate Commerce Commission. It is not only the Chain Institute. He would starve to death on our $45 a month (2343).

"Mr. Steinhauer: The same as Climax Traffic Bureau or anybody?

"The Witness: Yes. I know that some of them use Climax. I don't remember whether I heard it here or read it in the record" (2343).

Redirect examination by Mr. Steinhauer.

As to which ones use Climax, I would have to look that up, but it is in the record. I think they would use a traffic agency closer to their own home town than Pittsburgh. One in Cleveland would use it in Cleveland, and one in Chicago would use it in Chicago. I don't mean right now at the present time. I don't mean that if they had the book before they would use the book. You see the book was primarily gotten up during NRA to provide a uniformity 3356
of freight rates to use in quoting or filing a price with the Code Authority instead of everybody having—you can make some errors in these freight rates by getting hold of the wrong tariff, as I understand; some clerk might make a mistake and get in the wrong tariff reference (2344).

Therefore, in order to obviate the possibility of mistakes, we decided to have one concern, and preferably a Pittsburgh institution, which we selected as Donley, already having been our traffic advisors, to compile this original NRA freight schedule book. Then everybody would be starting from scratch (2344, 2345).

When it comes to billing, however, they all have to have some other service, because you bill on the basis of Pitts- 3357
burgh, but you have to allow the freight from your own factory, you see, to equalize. Take our case. We have a factory at York, Pennsylvania. If we ship east of Pittsburgh, we add the Pittsburgh freight to the York, and we make some money on it. That is your phantom freight. Donley did not supply that information—just from Pittsburgh. As to whether up to a year ago the record was

pretty good, to the best of my knowledge and belief, and I think Donley would testify and swear to that, those are taken from actual tariffs, those rates: supposed to be correct (2345).

Recross-examination by Mr. Denby.

"Q. That certainly was the intent? A. That was the intent, sir, subject to possible human error. Sometimes the errors are made in the tariffs themselves.

"Mr. Steinhauer: Yes" (2345).

3359 *Recross-examination by Mr. Denby resumed.*

The compilation of a freight rate book was never contemplated or considered by the Institute before the NRA, not as such, but I can say that for many, many years the industry—going back, way back, we used to use a freight book put out by the American Steel & Wire Company simply for convenience in referring to rates. Understand, it is used principally in quoting. That is if a man asked you specifically what you would charge him for 1,000 pounds of half-inch chain f.o.b. Atlanta, Georgia, then you would have got to get down to brass tacks and you have got to tell him that this is the price you are going to quote him. Now, whether you have used the correct freight rate
3360 or not, when you finally invoice the man, that is the figure that it must cost him. If you have made a mistake in the freight, you have got to equalize it on your invoice (2345, 2346).

The American Steel & Wire Company is not a manufacturer of chain (2346).

Redirect examination by Mr. Steinhauer.

As to whether the freight rates on their product are the same as on chain, at the time their books were issued, it was the same, but today that is what these fights are about here. They are trying to reclassify them, and some of the increases are as much as 300 per cent (2346).

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Office - Supreme Court, U.S.
FILED
OCT 1 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 554

CHAIN INSTITUTE, INC., AMERICAN CHAIN & CABLE COMPANY, INC., THE McKAY COMPANY, HODELL CHAIN COMPANY, ST. PIERRE CHAIN CORPORATION, S. G. TAYLOR CHAIN COMPANY, COLUMBUS McKINNON CHAIN CORPORATION, CAMPBELL CHAIN COMPANY, NIXDORFF-KREIN MANUFACTURING COMPANY, PEERLESS CHAIN COMPANY, THE JOHN M. RUSSELL MANUFACTURING COMPANY, INC., TURNER & SEYMOUR MANUFACTURING COMPANY, WESTERN CHAIN PRODUCTS COMPANY, WILLIAM D. KIRKPATRICK, and GEORGE J. CAMPBELL, JR.,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

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October Term, 1957

No. .....

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Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Chain Institute, Inc.; American Chain & Cable Company, Inc.; The McKay Company; Hodell Chain Company; St. Pierre Chain Corporation; S. G. Taylor Chain Company; Columbus McKinnon Chain Corporation; Campbell Chain Company; Nixdorff-Krein Manufacturing Company; Peerless Chain Company; The John M. Russell

Manufacturing Company, Inc.; Turner & Seymour Manufacturing Company; Western Chain Products Company; William D. Kirkpatrick, and George J. Campbell, Jr., respectfully pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Eighth Circuit entered on July 19, 1957 which affirmed and ordered the enforcement of an order to cease and desist issued by the Federal Trade Commission.

Opinions Below

The opinion of the Court of Appeals is reported in 246 F. 2d 231, and is printed in the Appendix, *infra*, pp. 29-44. The majority of the Federal Trade Commission wrote no opinion in connection with the issuance of the cease and desist order. Their findings as to the facts, conclusion and order, and the dissenting opinion of Commissioner Mason, are reported in 49 F. T. C. Dec. 1041, 1069-1110, and are in the record as printed for the Court below at pp. 592-662.[1]

Jurisdictional Statement

The judgment of the Court of Appeals (Appendix, *infra*, pp. 45-46) was entered on July 19, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

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[1] Nine copies of the record as printed for the Court below have been filed pursuant to paragraph 4 of Rule 21. References thereto will hereinafter be made by the letter "R." followed by the page number or numbers.

Questions Presented

1. Does this Court's decision in *Federal Trade Commission* v. *National Lead Company*[2] justify the inclusion in the Commission's instant order of a paragraph having the practical effect of (i) prohibiting the individual use of all types of delivered pricing, (ii) leaving no practical alternative but straight f.o.b. factory pricing, (iii) destroying the right of each petitioner as a private business concern to exercise its own independent business judgment as to whether it will use a point of origin or a point of destination pricing method, (iv) depriving each petitioner of the right to compete regularly in distant markets, and (v) seriously injuring petitioners in their businesses and reducing competition to the injury of the public?

2. Was the denial by the Commission of an opportunity to be heard on the form, substance and effects of the third ordering paragraph of the order a denial of due process of law?

3. Does mere "conscious parallelism" in the continued use of lawfully pre-existing delivered pricing methods during the period of an alleged price-fixing conspiracy justify an inference that such continued use was by agreement where such methods were non-collusive in their genesis and use long prior to such alleged price-fixing?

Statute Involved

Section 5 of the Federal Trade Commission Act, as amended,[3] provides in part as follows:

> "(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

* * *

[2] 352 U. S. 419 (1957).

[3] 38 Stat. 719 (1914), as amended, 15 U. S. C. A. § 45.

"(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations, * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

* * *

"(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business * * * the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence, and proceedings * * * a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed, * * *. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. * * * The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28."[4]

Statement of the Case

The Commission found that petitioners had engaged in an alleged price-fixing conspiracy.[5] The cease and desist order contained provisions against price-fixing.[6] In addition it contained two provisions relating to the three

[4] Certiorari is now governed by 28 U. S. C. § 1254(1).

[5] R. 592-653.

[6] R. 653-657.

delivered pricing methods which had existed traditionally in the industry:

(1) Subparagraph (6) of the first ordering paragraph required petitioners to cease *agreeing* to use the delivered pricing methods.[7]

(2) The third ordering paragraph required each manufacturing petitioner to cease the *individual* use of all three delivered pricing methods for the purpose or with the effect of systematically matching other sellers' delivered prices.[8]

The three delivered pricing methods, each applicable to a particular type of chain, were as follows:

(1) *"Universal Delivered Price" Method.* This method was used only on tire chains. Each manufacturer's price was a delivered price applicable to all destinations throughout the United States.[9]

(2) *Freight Equalization.* This method was used only on weldless chain. Each manufacturer sold at his f. o. b. factory price and the buyer paid the freight to destination. However, if such freight was greater than it would have been if the buyer had bought from a competing factory, the buyer was given an allowance equal to the difference.[10]

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[7] R. 655.

[8] R. 656-657.

[9] R. 608-609, 704, 745-746. Each manufacturer actually quoted a price f. o. b. his factory with full freight allowed to destination, making his f. o. b. factory price, in effect, his delivered price everywhere. The Commission calls this a "zone system".

[10] R. 606-607, 703, 735-738, 779, 878-879, 934-935.

(3) *Pittsburgh Plus.* This method was used only on welded chain. Each manufacturer sold at a price f.o.b. his factory plus the equivalent of the freight from Pittsburgh, Penna. to destination.[11]

The reason for three different delivered pricing methods is that originally there were three different chain industries each with its different group of manufacturers.

Welded chain was sold on the Pittsburgh Plus basis beginning in about 1900 because the raw material, steel, was then sold that way.[12] The companies then making welded chain did not make the other types.[13] As other companies entered the business they adopted the method because it was one that welded chain buyers were used to.[14] In 1945, in view of certain decisions of this Court,[15] one welded chain manufacturer abandoned Pittsburgh Plus and in 1947 another did likewise.[16]

The history and development of the Freight Equalization method of selling weldless chain are graphically depicted in Maps A through G, facing this page.[17]

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[11] R. 604-605, 702, 728-729.

[12] R. 702-703.

[13] R. 779.

[14] R. 702-703, 734, 880-881, 931.

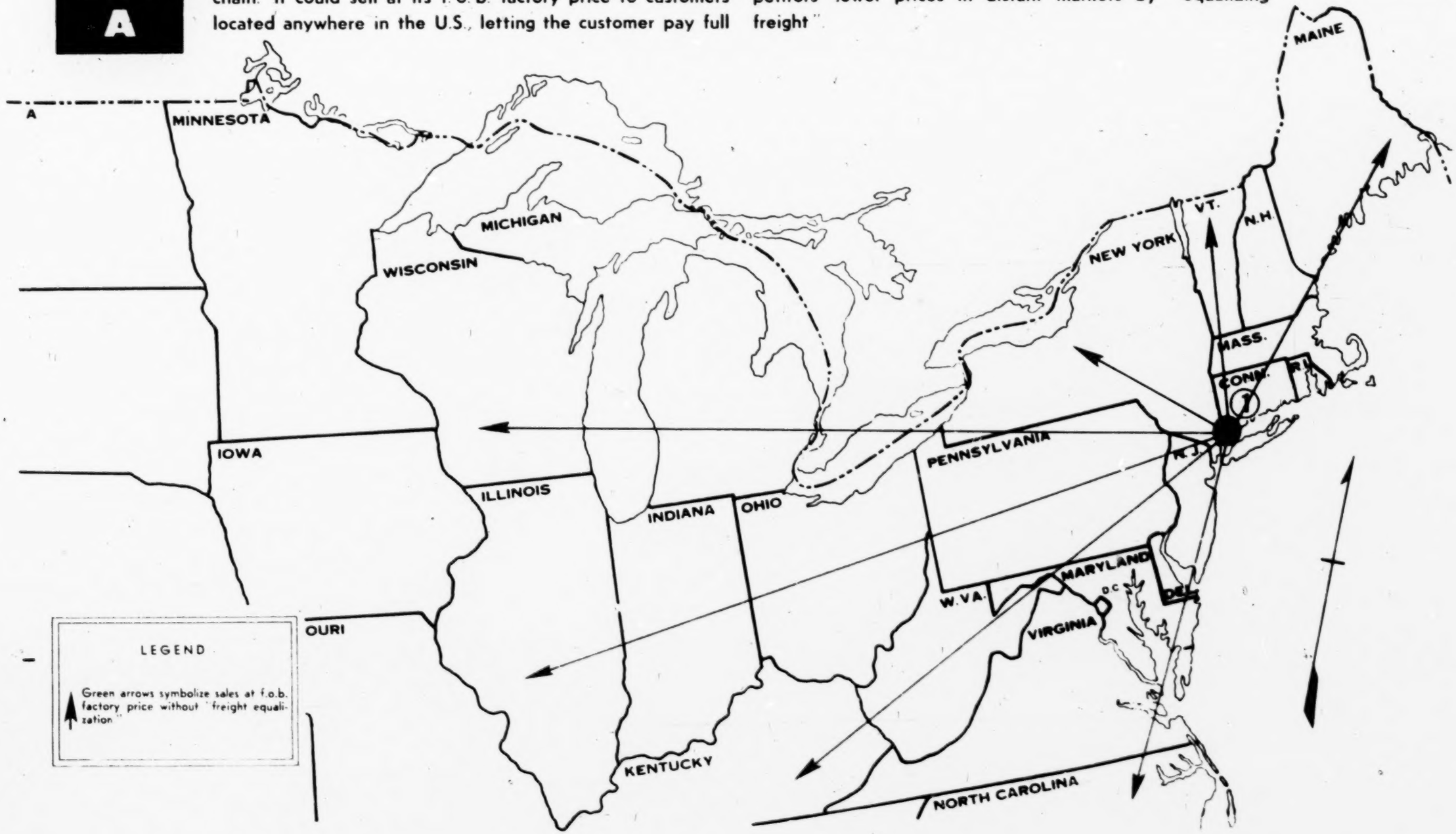
[15] *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726 (1945); *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746 (1945).

[16] R. 1013-1014, 1022.

[17] These maps are not exhibits in the case but were prepared to illustrate graphically the genesis and evolution of the Freight Equalization method as shown by the evidence (R. 735-736, 813-816, 819-820, 911, 926). The lines or "walls" shown on the maps, along which the freight from a plant on one side will be equal to that from a plant on the other, are not intended to be accurately located or shaped, but are drawn roughly midway between the plants concerned. This is in accordance with testimony on the subject (R. 864). Accurately drawn lines would, in view of the peculiarities of railroad tariffs, not necessarily lie exactly midway between the plants nor necessarily be straight lines.

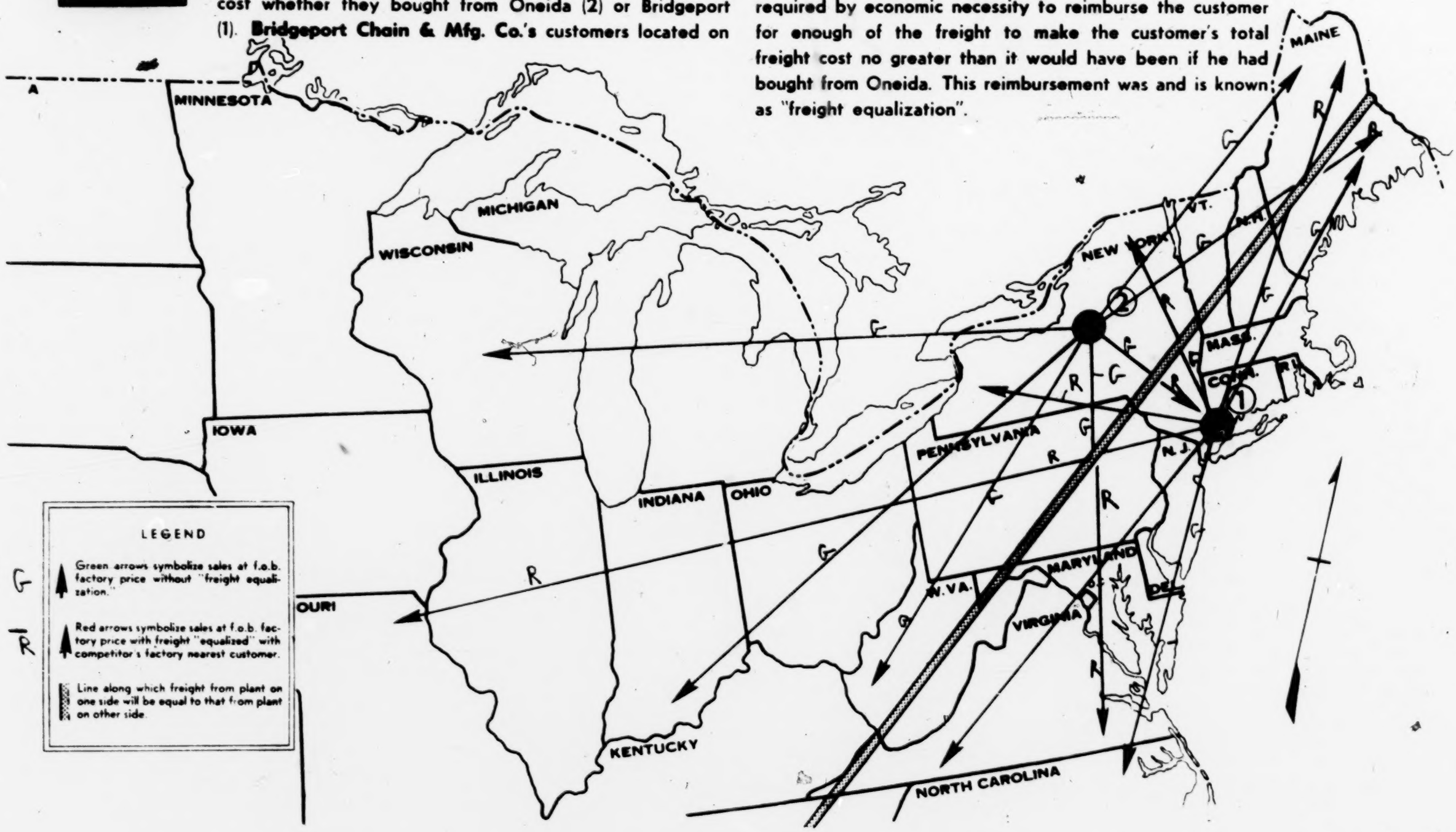
MAP A

Prior to 1908, **Bridgeport Chain & Mfg. Co.** of Bridgeport, Conn. (1) was the only producer of ordinary weldless chain. It could sell at its f. o. b. factory price to customers located anywhere in the U.S., letting the customer pay full freight from factory to destination. Having no competitors at all, it was under no economic compulsion to meet competitors' lower prices in distant markets by "equalizing freight".



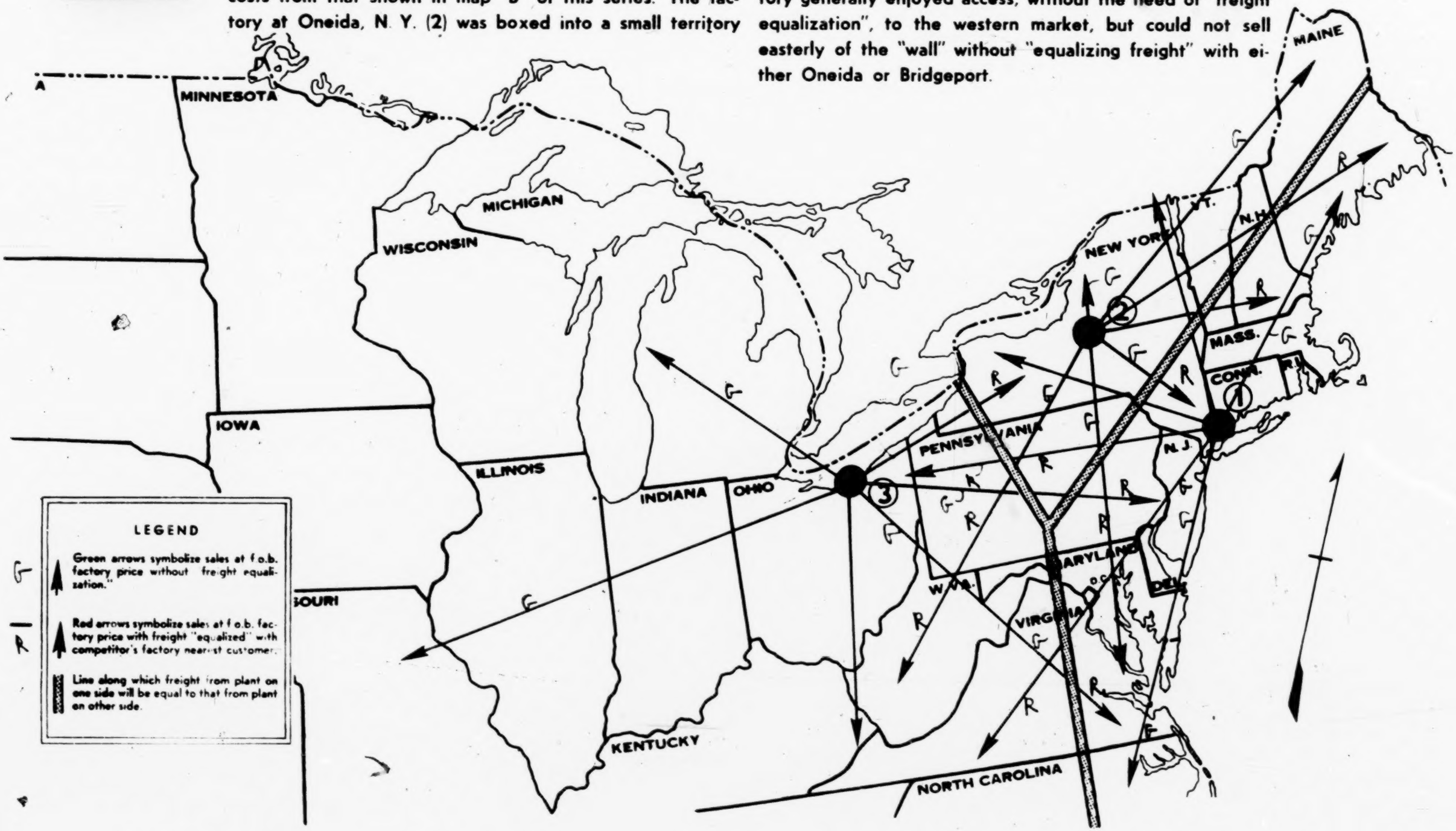
MAP B

By 1908, a second producer of ordinary weldless chain, **Oneida Community**, was in business at Oneida, N. Y. (2). The map below shows as a symbolic "wall" the approximate line along which customers would pay the same freight cost whether they bought from Oneida (2) or Bridgeport (1). **Bridgeport Chain & Mfg. Co.**'s customers located on Oneida's side of this "wall" would no longer pay the higher freight charge involved in buying from Bridgeport when they could buy from Oneida at a lower freight cost. To retain these customers, **Bridgeport Chain & Mfg. Co.** was required by economic necessity to reimburse the customer for enough of the freight to make the customer's total freight cost no greater than it would have been if he had bought from Oneida. This reimbursement was and is known as "freight equalization".



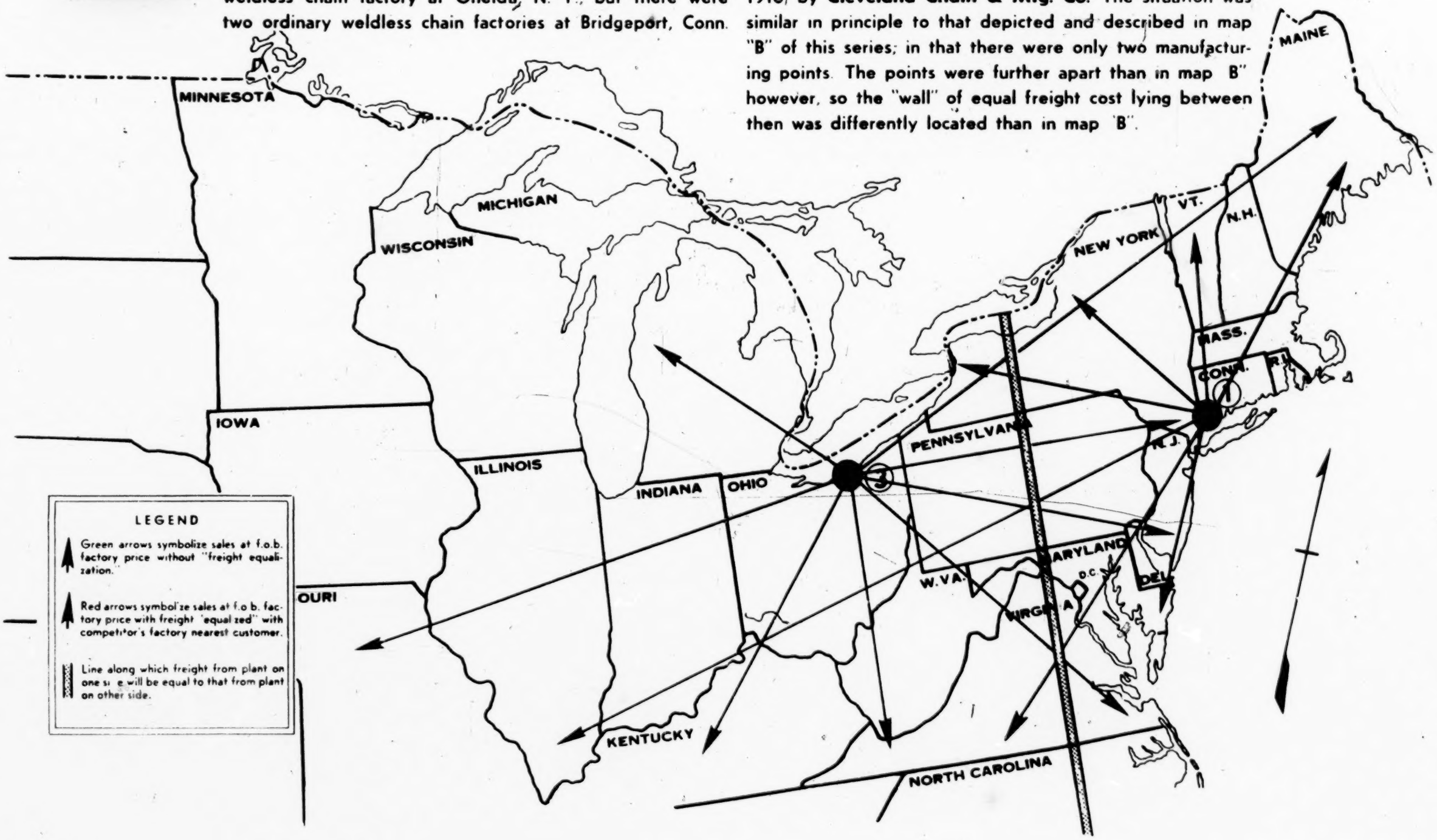
MAP C

About 1909 or 1910, a third producer of ordinary weldless chain, **Cleveland Galvanizing Co.** (predecessor of present Hodell Chain Co.), was in business at Cleveland, Ohio (3). This changed the pattern of the "wall" of equal freight costs from that shown in map "B" of this series. The factory at Oneida, N. Y. (2) was boxed into a small territory beyond which it could make no sales without "equalizing freight" with either Bridgeport (1) or Cleveland (3). The area in which the Bridgeport factory could sell without "equalizing freight" was narrowed. The new Cleveland factory generally enjoyed access, without the need of "freight equalization", to the western market, but could not sell easterly of the "wall" without "equalizing freight" with either Oneida or Bridgeport.



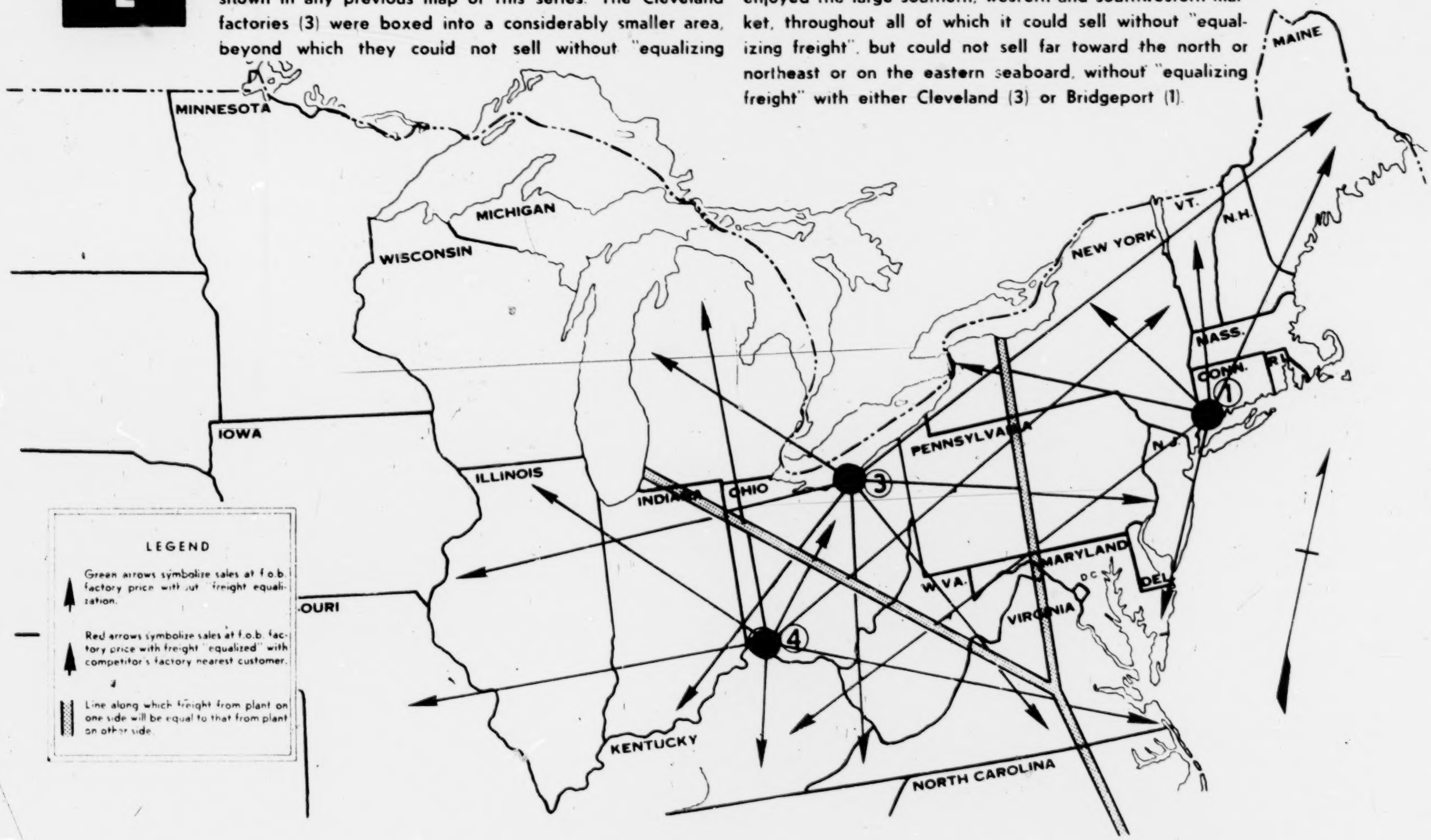
MAP D

In 1912 **Weed Chain Tire Grip Co.** (predecessor of present American Chain & Cable Co.) bought out the weldless chain business of **Oneida Community** and moved the machinery to Bridgeport, Conn. (1). There was no longer any weldless chain factory at Oneida, N. Y., but there were two ordinary weldless chain factories at Bridgeport, Conn. (1), one owned by **Bridgeport Chain & Mfg. Co.** and the other by **Weed Chain Tire Grip Co.** There were also two such factories in Cleveland, Ohio (3), one owned by **Cleveland Galvanizing Co.** and the other (opened in 1910) by **Cleveland Chain & Mfg. Co.** The situation was similar in principle to that depicted and described in map "B" of this series; in that there were only two manufacturing points. The points were further apart than in map "B" however, so the "wall" of equal freight cost lying between then was differently located than in map "B".



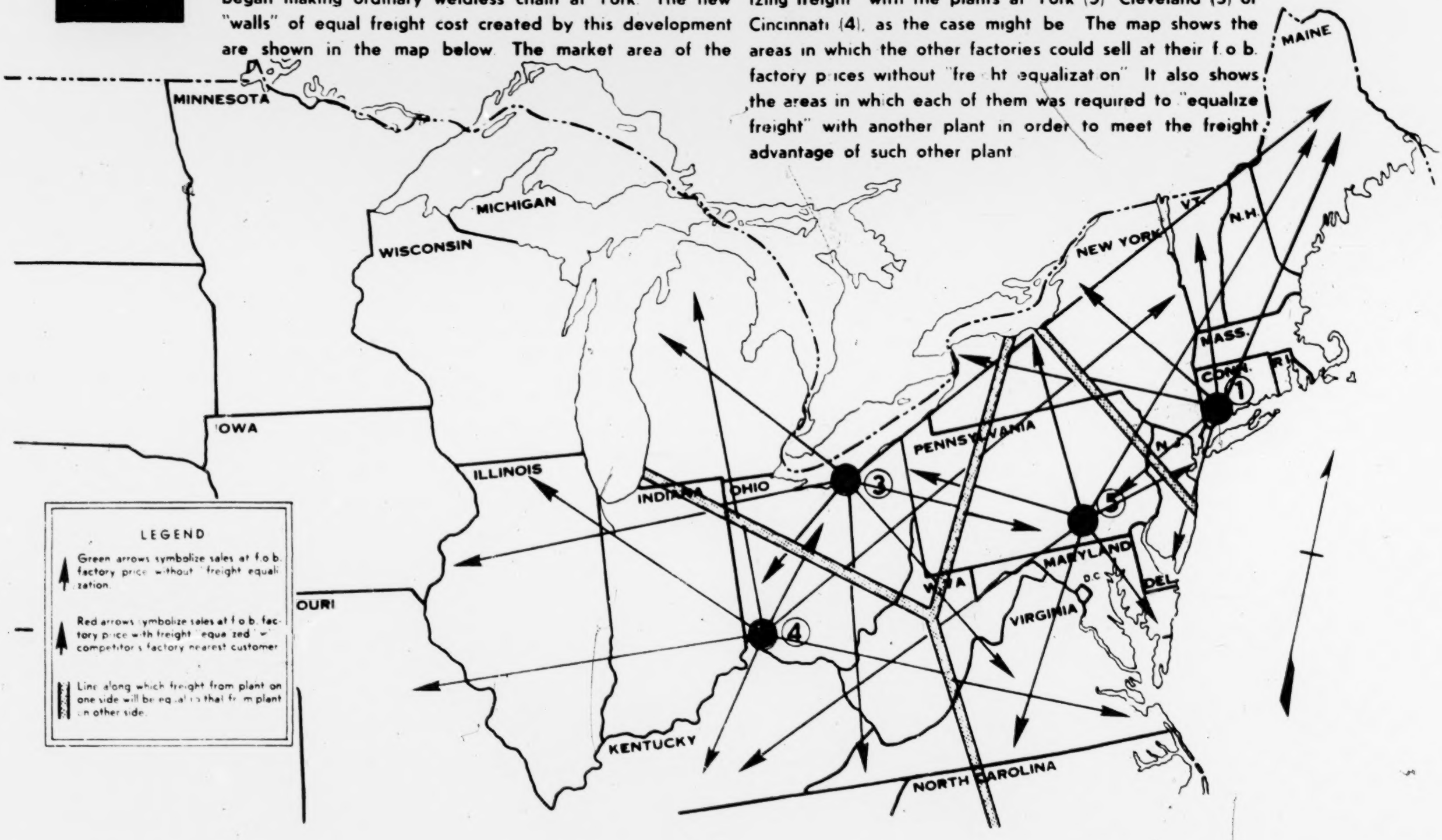
MAP E

In the early 1920's, **Cincinnati Pump Co.** began making ordinary weldless chain at Cincinnati, Ohio (4). This altered the pattern of the "wall" of equal freight costs from that shown in any previous map of this series. The Cleveland factories (3) were boxed into a considerably smaller area, beyond which they could not sell without "equalizing freight" either with Cincinnati (4) or Bridgeport (1). The Bridgeport factories (1) were in approximately the same situation as in map "D". The new Cincinnati factory (4) enjoyed the large southern, western and southwestern market, throughout all of which it could sell without "equalizing freight", but could not sell far toward the north or northeast or on the eastern seaboard, without "equalizing freight" with either Cleveland (3) or Bridgeport (1).



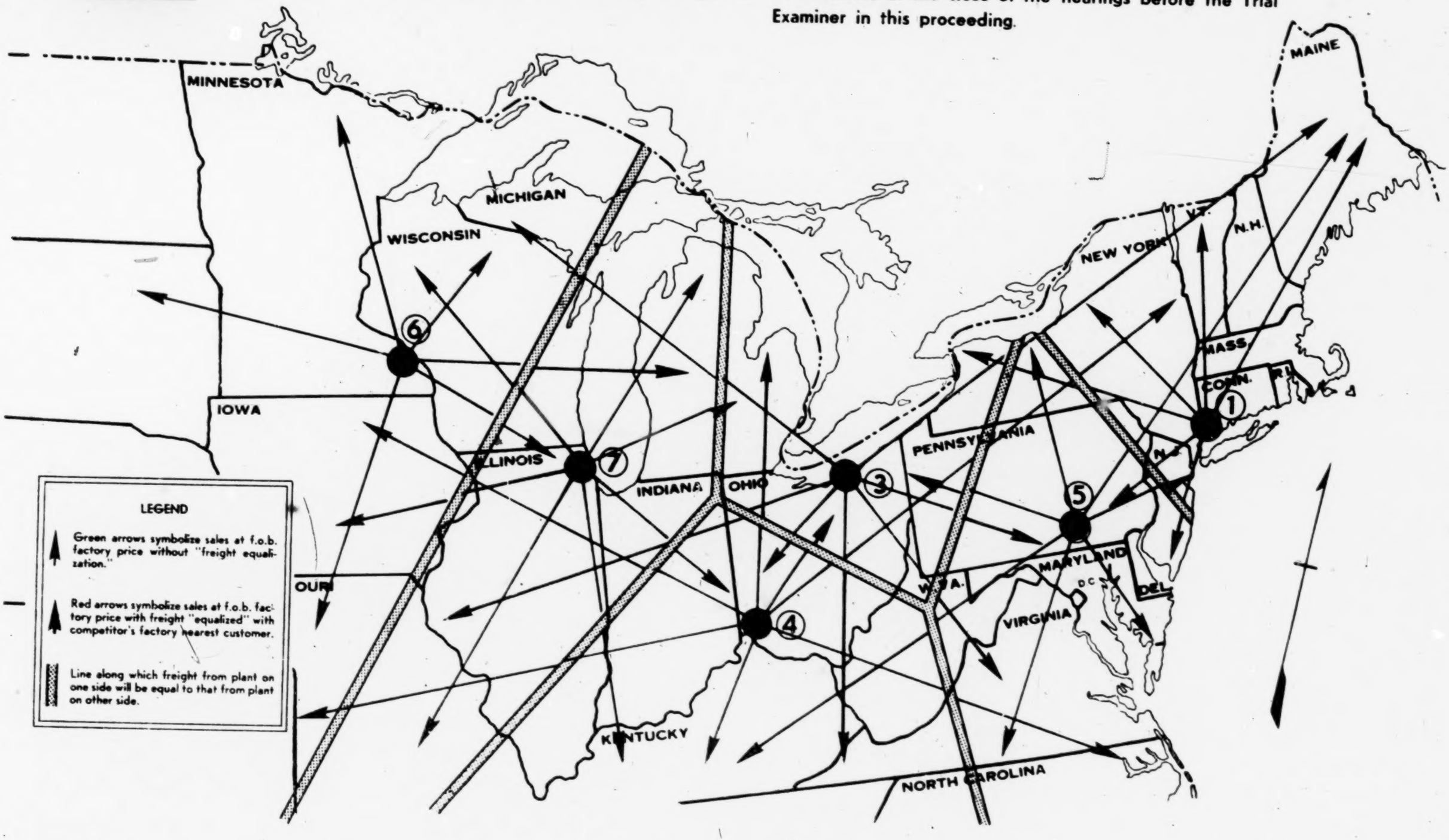
MAP F

About 1927, **American Chain & Cable Co.** moved its ordinary weldless chain factory from Bridgeport, Conn (1) to York, Penna. (5) About the same time **The McKay Co.** began making ordinary weldless chain at York. The new "walls" of equal freight cost created by this development are shown in the map below. The market area of the **Bridgeport Chain & Mfg. Co.** (1) was reduced to Eastern New York, Northern New Jersey and New England. It could not sell west or south of this area without "equalizing freight" with the plants at York (5) Cleveland (3) or Cincinnati (4), as the case might be. The map shows the areas in which the other factories could sell at their f.o.b. factory prices without "freight equalization". It also shows the areas in which each of them was required to "equalize freight" with another plant in order to meet the freight advantage of such other plant.



MAP G

In 1941, **Peerless Chain Co.** began making ordinary weldless chain at Winona, Minn. (6). In 1945, **Western Chain Products Co.** began making ordinary weldless chain at Chicago, Ill. (7). This map shows the resulting changes in the "walls" of equal freight costs, and the extent to which "freight equalization" would be necessary under normal economic conditions in the ordinary weldless chain industry as it existed at the close of the hearings before the Trial Examiner in this proceeding.



The Universal Delivered Price method of selling tire chains was adopted by Weed Chain Tire Grip Co.[18] in about 1905 when it first introduced tire chains as a patented product. It chose this method because it was the best way to obtain nationwide sales of a new consumer product. Moreover, it was the way in which most automobile accessory products were sold and auto accessory jobbers insisted on it.[19] When Weed's patents expired in 1921 other tire chain manufacturers entered the field and adopted the method because they could think of no better one and because their jobber customers insisted on it.[20] One of the new manufacturers tried to sell on an f.o.b. factory basis but his customers deducted their freight costs in paying his invoices, thus, in effect, putting him on the Universal Delivered Price basis.[21]

There was direct, categorical and uncontradicted testimony that none of the three delivered pricing methods was the subject of agreement either in its adoption or continued use by any manufacturer.[22] There was no contrary evidence, nor did the Commission make any evidentiary finding to the contrary. The Commission's sole evidentiary findings on the question of alleged conspiracy to use the delivered pricing methods, indeed on the entire subject of delivered pricing were limited to:

(i) a description of each method;[23]

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[18] Weed Chain Tire Grip Co. was the predecessor of petitioner American Chain & Cable Company, Inc.

[19] R. 824-829, 884-887, 889, 1066-1068, 1071-1072.

[20] R. 746, 754, 828-829, 898-899, 903-904, 1032-1033, 1058-1059.

[21] R. 897, 904.

[22] R. 729-730, 733-734, 740-741, 744, 748, 779, 793-794, 820, 826-829, 878-881, 886-887, 897-899, 903-904, 931, 942, 945, 982-983, 992, 1017, 1022, 1032-1033, 1045-1046, 1050-1051, 1054, 1056, 1058-1059, 1066-1073, 1111-1112.

[23] Findings 3, 4 and 5, R. 604-609.

(ii) a description of the Chain Institute's freight rate book which was used (and usable) only in pricing welded chain;[24] and

(iii) a finding of "conscious parallelism" in the use of each of the methods.[25]

Following such evidentiary findings, the Commission drew the inference that there was

> "* * * *necessarily* an understanding and agreement between all of the respondents that each * * * would continue to use the particular [delivered pricing] method or system applicable to the type or types of chain each sold. Otherwise the various cooperative and collective actions entered into and engaged in would not have brought about the results desired."[26]

Based presumably on the foregoing inference, the Commission included subparagraph (6) in the conspiracy portion of its order. The effect of that subparagraph was to prohibit petitioners from *agreeing* or *conspiring* to:

> "(6) Quote or sell chain or chain products at prices calculated or determined pursuant to or in accordance with the single basing point delivered-price system, the freight equalization delivered-price system, or the zone delivered-price system; or quote or sell chain or chain products at prices calculated or determined pursuant to or in accordance with any other plan or system which results in identical price quotations or prices * * * by any two or more sellers * * * using such plan or system or which prevents

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[24] Finding 6 (e), R. 637-638. This book was required by the N. R. A. Code and was continued thereafter as a convenience for those manufacturers of welded chain who cared to use it but not all did so (R. 795-796, 932, 941, 1052-1053, 1112, 1117).

[25] Finding 9, R. 649-651 (see first sentence of paragraph which commences on R. 650).

[26] *Ibid.* (Italics supplied).

purchasers from finding any advantage in price in dealing with one or more as against another seller." [27]

In addition, the Commission inserted in its order a third ordering paragraph, *applicable regardless of agreement or the lack of it*, and reading as follows:

> "IT IS FURTHER ORDERED that each of the corporate respondents [naming them] * * * do forthwith cease and desist from quoting or selling chain or chain products at prices calculated or determined pursuant to or in accordance with a single basing point delivered-price system, a freight equalization delivered-price system, or a zone delivered-price system, for the purpose or with the effect of systematically matching the delivered-price quotations or the delivered prices of other sellers of chain or chain products and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another." [28]

Petitioners here seek review of the Court of Appeals' affirmance of the above-quoted two paragraphs of the Commission's order and review of the affirmance of the Commission's conclusion that there was "*necessarily* an understanding and agreement" to continue the use of the delivered pricing methods.[29]

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[27] R. 655.

[28] R. 656-657.

[29] (Italics supplied). Petitioner Chain Institute, Inc. is not affected by the third ordering paragraph and joins in this petition only with respect to subparagraph (6) of the first ordering paragraph and the aforementioned inference of agreement on which subparagraph (6) is based. Petitioners originally sought review in the Court of Appeals of all of the Commission's findings of conspiracy and its entire cease and desist order. They abandoned their attack on the conspiracy portions of the findings and order (except those relating to the delivered pricing methods) not because they conceded the correctness of such findings but to save time and expense and simplify the issues. Not all the parties who were respondents before the

Reasons for Granting the Writ

I.

The first question is whether this Court's *National Lead* decision [30] justifies the inclusion in the instant order of the above-quoted third ordering paragraph under the circumstances of the instant case.

In sustaining that paragraph the Court of Appeals relied on the *Lead* decision. If we understand that decision, however, it merely affirmed the Commission's statutory authority, *under the circumstances of the Lead case*, to include in its order a conditional prohibition of the individual use of one delivered pricing method, a zone system.

Lead Case Circumstances Entirely Different from Instant Case

The circumstances of the *Lead* case are totally different from the corresponding circumstances of the instant case. The *Lead* zone system was actually *created* by agreement to replace a pre-existing and apparently lawful delivered pricing method.[31] The Commission emphasized this fact

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Commission are petitioners here. Frank A. Bond died and the order was modified to strike his name from it (R. 664). Pyrene Manufacturing Company sold its chain business while the case was before the Commission and elected not to participate further (R. 233-234). The Bridgeport Chain & Manufacturing Company, Cleveland Chain & Manufacturing Company, Round California Chain Company, Seattle Chain & Mfg. Company and Woodhouse Chain Works sold their chain businesses to Republic Steel Corporation while the case was pending on review in the Court of Appeals and, on their motion, the Court of Appeals on September 23, 1955 entered an order dismissing the petition for review as to them (Appendix, *infra*, pp. 47-54). Dennis A. Merriman died in 1957.

[30] *Supra*, note 2.

[31] *Ibid.*, at pp. 421-423.

in justification of the paragraph forbidding further individual use of the zone system.[32] In the instant case there is no finding nor evidence that any of the delivered pricing methods had its origin in conspiracy. On the contrary, the uncontradicted evidence (ignored by the Commission in its findings) was that the origin and history of each method was a normal economic one.[33]

This Court characterized the *Lead* zone system as "highly artificial", saying that the zone boundaries led to "bizarre results" because purchasers near factories sometimes paid more than those at a distance.[34] The Court of Appeals referred to the *Lead* zone system as "so arbitrary and artificial as to negative an inference of innocent parallel behavior."[35] In the instant case neither the Universal Delivered Price method nor the Freight Equalization method could be characterized as "artificial" or "bizarre". Neither of these methods could nor did result in customers near factories paying more than those at a distance.[36] Neither of them could be said to "negative

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[32] 49 F. T. C. 791 at p. 884.

[33] Statement of the Case, *supra*, pp. 6-7.

[34] *Supra*, note 2 at p. 422.

[35] *National Lead Co.* v. *Federal Trade Commission* (CCA-7, 1955), 227 F. 2d 825 at p. 834.

[36] The Pittsburgh Plus method, used only on welded chain, did occasionally have this result. This method is generally regarded as outmoded. However, it was a common method in the first several decades of this century and its genesis was equally as innocent as those of the other two types. By dismissing Count II of the amended complaint, the Commission expressly exonerated the Pittsburgh Plus method in *this case* from the Robinson-Patman Act defects of the single basing point system condemned by this Court under that statute in the *Corn Products* and *Staley* cases, *supra*, note 15. Although the ten year old record in this case does not show it, counsel are informed that the Pittsburgh Plus method is no longer used by any of the petitioners. The record does show that two of the petitioners had already abandoned it by 1947 (*Supra*, note 16).

an inference of innocent parallel behavior". Indeed, the Commission itself has said of the Universal Delivered Price method that under circumstances such as those pertaining to tire chains (a relatively low average freight cost),[37] it "may be a method of quoting more convenient to buyer and seller and less costly than a point of origin price", and that it "would not be inconsistent with price competition and would not be indicative of any lack of such competition."[38]

Since the *Lead* zone system was created as part of the price-fixing conspiracy and never enjoyed a period of non-collusive existence (it apparently was too artificial to exist independently), it was necessary to ban it so as to insure the discontinuance of the conspiracy. In the instant case, however, the delivered-pricing methods antedated the alleged price-fixing conspiracy by some 25 years and demonstrated their ability to exist without it. There is no warrant for assuming that the alleged price-fixing conspiracy cannot be eliminated unless they too are eliminated.

Lead Order Prohibits Only Zone System; Instant Order Stops All Delivered Pricing

The most important distinction between the *Lead* order and the instant third ordering paragraph, however, is that while the former prohibits *only* the zone system, the latter indiscriminately prohibits *all three methods* of delivered pricing used in the chain industry. Its prohibitions encompass all the known methods of delivered pricing with the possible exception of selling f. o. b. a nationwide fleet

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[37] A study of invoices in the record showed that the average amount of freight allowed by tire chain manufacturers in selling on the Universal Delivered Price basis was only 5½% of the delivered price paid by the customer (R. 1104-1106, Res. Ex. 54).

[38] "Price Bases Inquiry; the Basing Point Formula and Cement Prices," published by the Federal Trade Commission in 1932, and printed by the U. S. Government Printing Office, p. 13.

of trucks or f. o. b. a nationwide network of warehouses—two very expensive methods which are not generally available to the smaller members of the industry.[39]

It is true that the third ordering paragraph applies only when one of the delivered pricing methods is used for the purpose or with the effect of systematically matching the delivered prices of a competitor. *But this is the normal and lawful purpose and effect of any delivered pricing method*—to enable a seller to meet (match) the prices of competing sellers whose plants are located closer to the customer than his.[40] If, therefore, a petitioner lowers his price in a distant market to meet that of a local seller and does this with any regularity (i.e., other than sporadically or occasionally), he risks the charge that he acted "systematically" and thereby violated the order.

That this is the Commission's position is demonstrated in its supplemental memorandum to this Court in the *Lead* case in which the Commission stated that a lead pigments manufacturer might sell on a zone price basis provided his prices were different from his competitors'.[41] Apparently recognizing the predicament this would put the seller in where his prices were *higher* than his competitors',[42] the Commission stated that the seller might meet (match) a competitor's lower price "*in some instances*" without violating the order.[43] The number of instances comprising

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[39] "Study of Federal Trade Commission Pricing Policies," Senate Document No. 27, 81st Cong., 1st Sess. (1949) describes all known delivered pricing methods (pp. 2-5) and comments on the lack of availability of f. o. b. truck and warehouse pricing to small sellers (p. 20).

[40] Chain of a given type, size and specifications is "homogeneous" in the sense that buyers will not pay more for one manufacturer's product than for another's (R. 748, 780, 1055-1056, 1097).

[41] Appendix, *infra*, pp. 58-59.

[42] *Ibid.*, p. 59.

[43] *Ibid.*

"some instances" was either so uncertain or so small, however, that the Commission concluded that "It seems entirely probable that respondents would use a different pricing method rather than risk violation of the order through the use of zone delivered pricing." [44]

But in the instant case there are no different pricing methods available, except: (i) straight f. o. b. factory pricing, or (ii) the very expensive f. o. b. truck or warehouse pricing. To the smaller manufacturers unable to afford alternative (ii), straight f. o. b. mill pricing would seem the only haven against prosecution.

Uncontradicted evidence (ignored in the Commission's findings) showed that enforced f. o. b. mill pricing would have disastrous economic effects in the chain industry. It would confine each manufacturer to an area closer freightwise to his plant than to the plants of his surrounding competitors, and with the exception of two manufacturers, there would not be enough business in that circumscribed area to keep the plant going.[45] When the testimony was taken (some 10 years ago) there were thirteen chain manufacturers *not* subject to the order.[46] In the meantime five of the companies which *are* subject to the order (an affiliated group which collectively is the second largest concern in the industry) have sold their chain businesses to Republic Steel Corporation which is not subject to this order because it bought only their physical assets and did not assume their liabilities.[47] (The five concerns are still in existence making products other than chain.) Republic Steel and the other concerns outside the order are all free to use any delivered pricing method they wish for the purpose of meeting or

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[44] *Ibid.*

[45] R. 760-762, 835-836, 863-865, 870, 899-900, 915-916, 945-948, 983-988, 1035, 1040-1041.

[46] R. 607, 852-853, 967-968, 1092.

[47] *Supra*, note 29 (next to last sentence).

matching, *as systematically as they wish*, the prices of petitioners in the latters' home markets. Petitioners may not, however (unless they have the resources to establish chains of warehouses as f. o. b. points), recoup this lost business by selling in the home markets of the invaders, except occasionally or sporadically, if they wish to avoid prosecution for violating the order. Surely, the objective of restoring competition in the chain industry cannot be accomplished by hobbling petitioners (particularly the smaller companies that cannot afford extensive warehouses) so they cannot compete.

Special Economic Reasons for Use of Universal Delivered Price Method in Selling Tire Chains

In the case of tire chains the best markets shift about from year to year depending on the amount of snowfall in a given area.[48] The small St. Pierre Chain Company which has the only tire chain plant in New England (at Worcester, Mass.) was one of the two concerns that the evidence showed could obtain enough business in its home markets under f. o. b. mill pricing to keep its plant running.[49] But this presupposed that New England would always have sufficient snow which the evidence showed not to be true.[50] It also presupposed that all of St. Pierre's competitors would also be forced onto f. o. b. mill pricing which is not true of Republic Steel or the other outside chain manufacturers.

Shifting weather conditions are one of the reasons why it is essential for tire chains to be sold on the Universal Delivered Price basis. This method enables them to be sold freely in any market in the United States. The public interest is promoted by this method of selling because in severe blizzards no one manufacturer could supply the emergency demands of an area.[51]

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[48] R. 757-759, 834-835, 871, 900, 950, 951-952.
[49] R. 899-900.
[50] R. 900.
[51] R. 757-758, 834-835.

Republic Steel and other manufacturers outside the order presumably will continue to use the Universal Delivered Price method of selling their tire chains. But despite the conditional language of the third ordering paragraph, anyone subject to the order faces grave risks if he tries to use the method at all. If, in using it, he puts his prices higher than those of other manufacturers he will make no sales. If he meets (matches) the prices of other manufacturers, he will face prosecution under the order. Even if he sets his prices below those of others, the manufacturers not under the order will meet his lower prices and, in the fluctuations of the market, it will ultimately become difficult, if not impossible, for him to prove who met (or matched) whom; so again he will risk prosecution under the order. Since the jobbers who handle tire chains not only prefer but *insist* on the Universal Delivered Price method (it being the way they buy their other auto accessory products),[52] petitioners will be foreclosed for all practical purposes from the only method of selling by which they can get their tire chains on the market. Yet this method, far from being iniquitous, is used on chewing gum, cigarettes and many other products, as the Court of Appeals noted,[53] and is a traditional American method of selling.

Sec. 2(b) of Robinson-Patman Act Will Not Ameliorate Bad Effects of Order

This Court stated in the *Lead* case that the provisions of Section 2 (b) of the Clayton (Robinson-Patman) Act,[54] permitting the meeting of lower competitive prices, are to be read into every Commission order.[55] However, it also said that this will not enable a seller to plead this section in defense of an entire pricing "system"[56] and that the

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[52] *Supra*, notes 19 and 20.

[53] 246 F. 2d 231, at p. 236; Appendix, *infra*, p. 36.

[54] 49 Stat. 1526 (1936), 15 U. S. C. A. § 13 (b).

[55] *Supra*, note 2 at p. 426.

[56] *Ibid.*, at pp. 426 and 431.

section is designed to protect competitors in "individual transactions".[57] The Commission's supplemental memorandum in the *Lead* case[58] has made clear, as we have already shown, that it will regard as "systematic" any but the most occasional and sporadic cases of meeting (matching) competitors' prices when a prohibited delivered pricing method is used. Moreover, the Commission's record in the *Standard Oil of Indiana* case demonstrates its lack of sympathy with the meeting-competition defense.[59] The difficulty of determining how frequently one can meet a competitor's price without risking prosecution under the order will prevent Section 2 (b) from granting much practical relief from f. o. b. mill pricing under the instant order.

Grave Doubts of Court of Appeals

The Court of Appeals expressed grave doubts as to the third ordering paragraph, stating, "If this paragraph * * * were to be given the effect of depriving each of the petitioners of every lawful and practical method of independently and honestly selling its products at delivered prices, and thus preventing it from engaging in nationwide competition, we would consider the paragraph invalid."[60] The Court of Appeals also stated, "It is possible that the Commission has made its order too broad in undertaking to proscribe the qualified independent use by each of the petitioners of the only practical systems of delivered pricing for its chain products. If in the *National Lead Co.* case the Commission had prohibited not only the individual use of

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[57] *Ibid.*, at p. 431.

[58] Appendix, *infra*, pp. 55-59.

[59] *Matter of Standard Oil Co.*, 41 F. T. C. Dec. 263, mod. 43 F. T. C. Dec. 56, *aff'd. Standard Oil Company (of Indiana) v. Federal Trade Commission* (CCA-7, 1949), 173 F. 2d 210, *rev'd* 340 U. S. 231 (1951); reconsidered on remand 49 F. T. C. Dec. 923, *rev'd*, (CCA-7, 1956), 233 F. 2d 649, *cert. granted* 352 U. S. 950 (1956).

[60] 246 F. 2d 231, at p. 237; Appendix, *infra*, pp. 38-39.

the single delivered price system there involved, but had also conditionally prohibited the use of all other practical delivered price systems, the Supreme Court might have refused to sustain so broad a prohibition." [61]

The Court of Appeals, however, quoted the Commission's supplemental brief in the instant case as suggesting that f. o. b. factory pricing is not the only alternative under the third ordering paragraph. According to that brief, the paragraph can be complied with by "competition in base prices." [62] By "competition in base prices" the Commission evidently means that each petitioner should have a different f. o. b. factory price. So far so good, but regardless of his base price level, when a petitioner's price plus the freight to a particular customer exceeds the price plus freight of a competing seller, the petitioner must alter his price and/or absorb enough of the freight cost so that his combination of base price plus freight will equal his competitor's base price plus freight. Absent the instant order, the petitioner has no choice but to *exactly match* the competitor's price, for any attempt to go below it will deprive him of the meeting-competition defense and thereby cause him to violate the Robinson-Patman Act, while failing to go as low as the competitor will lose him the sale. The third ordering paragraph, however, leaves him on the horns of a three-pronged dilemma. He must either: (i) lose the sale, (ii) violate the Robinson-Patman Act, or (iii) by meeting (matching) the competitor's delivered price, risk violating the instant order, for if such meeting (matching) is done more than occasionally or sporadically the Commission will treat it as the use of a "freight equalization * * * system * * * for the purpose [and] with the effect of systematically matching the * * * delivered prices of other sellers * * *"

The Court of Appeals stated that "The question of the evidentiary basis for the third ordering paragraph as

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[61] 246 F. 2d 231, at p. 238; Appendix, *infra*, pp. 39-40.

[62] 246 F. 2d 231, at p. 239; Appendix, *infra*, p. 42.

applied to all types of chains and to every petitioner, whether it had used all of the three delivered price systems or not, is, to say the least, debatable."[63] The Commission in its supplemental brief in the Court of Appeals had sought to justify this indiscriminate prohibition of all three delivered pricing methods (even though not used by all petitioners or on all types of chain) by stating that it would guard "against the use of the simple device of interchanging the systems used as among the three types of chain, and thus perpetuating the restraints of trade at which the order is directed."[64] Obviously, if such an interchange was by agreement it would violate the conspiracy part of the order. However, if it was the result of competition the Commission should have no more ground for objecting to or preventing it than if f. o. b. factory pricing or any other business practice had resulted from competition. *But the third ordering paragraph does not differentiate between acts of conspiracy and acts of competition.* One wonders what the Commission would have ordered if petitioners had been selling on a straight f. o. b. factory basis.

Commission's Failure to Consider Economic Effects of Order or Possible Alternative Remedies

In the instant case (unlike the *Lead* case where the Commission wrote an opinion stating its reasons for prohibiting the independent use of the zone system), the Commission wrote no opinion and, in its findings, said nothing to indicate that it had given any consideration whatsoever to the appropriateness or effects of the third ordering paragraph. The Commission studiously avoided any reference in its findings to the voluminous and uncontradicted evidence that the three delivered pricing methods in the instant case had (unlike the zone system in *Lead*) *not* been created by agreement but had been normal, non-collusive developments in the industry long prior to any alleged price-fixing conspiracy. The findings are, in fact, *wholly silent as to the*

[63] 246 F. 2d 231, at p. 238; Appendix, *infra*, p. 41.
[64] 246 F. 2d 231, at pp. 237-238; Appendix, *infra*, p. 39.

third ordering paragraph and for all that appears, it was inserted simply because a similar paragraph had been included in the *Lead* order issued thirty-five days earlier. The Commission clearly gave no consideration to the economic effects of the order, nor to the possible use of other less drastic remedies to accomplish its unannounced objective.

In *Federal Trade Commission* v. *Royal Milling Company*,[65] this Court held that the Commission could not prohibit all further use of a valuable trade mark, even though misleading, where the evil could be overcome by requiring the mark to be accompanied by appropriate explanatory language. In *Jacob Siegel Co.* v. *Federal Trade Commission* [66] a similar situation was presented, and this Court held that the Commission should have considered other alternative and less drastic remedies before imposing one that destroyed a valuable property right. Since the Commission's decision in *Siegel* (as in the instant case) did not show whether or not it had considered alternative remedies or, if so, why it had rejected them as unsuitable, this Court remanded the case to the Commission, saying:

> "* * * the courts are not ready to pass on the question whether the limits of [administrative] discretion have been exceeded in the choice of the remedy until the administrative determination is first made." [67]

Significantly, the Commission has never apparently considered any remedy necessary, except the mere prohibition of conspiracy, in the many price-fixing cases involving delivered pricing systems in which it has issued orders subsequent to its decisions in the *Lead* case and this

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[65] 288 U. S. 212 (1933).
[66] 327 U. S. 608 (1946).
[67] *Ibid.* at p. 614.

case.[68] An industry honestly desiring to compete is not hurt by an order forbidding conspiracies, but it cannot live under an order like the third ordering paragraph.

We respectfully submit that in affirming the Commission's third ordering paragraph, the Court of Appeals has misconstrued and unduly expanded the scope of this Court's decision in the *Lead* case and ignored this Court's decisions in the *Siegel* and *Royal Milling* cases. The question whether the authority granted the Commission by the *Lead* decision can be carried to the extreme of destroying, for all practical purposes, petitioners' rights to use delivered pricing to meet distant competitors' prices is an important question which has not been, but should be, settled by this Court.

The opinion of the Court of Appeals is a readily apparent *invitation* to this Court to consider the questions posed by the strong factual distinctions between this case and the *Lead* case and to consider the scope of its opinion in the *Lead* case.

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[68] *Matter of Sayles Finishing Plants, Inc.*, 49 F. T. C. Dec. 1427 (1953); *Matter of Blotting Paper Ass'n.*, Dkt. No. 6107, consent order to cease and desist (released Oct. 22, 1953); *Matter of U. S. Steel Corp.*, Dkt. No. 6078, consent order to cease and desist (released May 13, 1955); *Matter of Barnes Metal Products Co.*, Dkt. No. 6225, consent order to cease and desist (released Feb. 21, 1955); *Matter of Cordage Institute*, Dkt. No. 5848, consent order to cease and desist (released May 23, 1956). And see *Matter of Metal Lath Mfrs. Ass'n.*, Dkt. No. 5449, order dismissing complaint, Feb. 16, 1954, in which the complaint was dismissed (because the license agreements embodying the alleged conspiracy had been terminated five years before the complaint was issued) despite the fact that a zone system *created* by the licenses was still in use in the industry. If, in the *Metal Lath* case, the Commission deemed it possible for a price-fixing conspiracy to be discontinued notwithstanding the continuation of a zone system which was part of the conspiracy and had not existed prior to the conspiracy, why did the Commission deem it necessary in the instant case to prohibit not only further conspiracy but all further use of delivered pricing methods that had pre-existed any conspiracy and been entirely non-collusive in their genesis and use? The Commission's decision in the instant case fails to answer this question.

II.

The second question is whether the denial by the Commission of any opportunity to be heard on the form, substance or effects of the third ordering paragraph was a denial of due process of law.

The third ordering paragraph was not requested by counsel for the Commission (as the corresponding paragraph was in the *Lead* case), nor was it included in the Trial Examiner's recommended order.[69] Neither was it mentioned or suggested during either of the two oral arguments before the Commission, nor for that matter at any stage of the proceedings until it appeared out of a clear sky in the Commission's order issued some two and one-half years after the second oral argument.

In the *Lead* case the petitioners claimed in this Court that they had been denied due process because they had had no opportunity to defend against their counterpart of the third ordering paragraph. This Court found, however, that they *had* had such an opportunity but had not availed themselves of it.[70] In the instant case, this cannot be said. Petitioners were diligent in seeking an opportunity to defend against the third ordering paragraph once it appeared. Their motion to the Commission for a rehearing for this purpose was, however, denied out of hand, not on its merits but solely on the collateral (and, we submit, erroneous) ground that the Commission's membership had changed since the order was issued.[71] Petitioners then moved the Court of Appeals to remand the case to the Commission with instructions to hear petitioners' objections to the paragraph, but that motion was also denied.

When the Commission denied petitioners' motion for a rehearing, one Commissioner strongly dissented, saying

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[69] R. 454-459.

[70] *Supra*, note 2 at pp. 427-428.

[71] R. 665-667.

that no opportunity had been afforded for argument for or against the third ordering paragraph and that "it appears to me imperative that the existing Commission should correct such defect in the proceedings."[72] He further questioned the Commission's inconsistency in the matter of due process, stating that for three years the Commission had had a practice of allowing both sides an opportunity to argue for or against any proposed change by the Commission in the Hearing Examiner's form of order, but that the parties in this case were not accorded that right.[73]

We respectfully submit that the denial by the Commission of any opportunity to be heard on the form, substance or effects of the third ordering paragraph, and the Commission's and Court of Appeals' denials of petitioners' specific requests for such a hearing before the Commission, constituted a denial of due process of law.

III.

The third question is whether "conscious parallelism" in the continued use of delivered pricing methods during a period of alleged price-fixing justifies an inference that such continued use was by agreement, where such methods were non-collusive in their genesis and use long prior to such alleged price-fixing.

The question of "conscious parallelism" as evidence of conspiracy has long plagued the courts and practitioners at the antitrust bar. The theory seems to have had its beginning in this Court's decision in *Interstate Circuit, Inc.* v. *United States*,[74] where the parallel action was initiated by a specific invitation issued by one of the partici-

[72] R. 679.
[73] R. 680-681.
[74] 306 U. S. 208 (1939).

pants. Subsequent lower court decisions appear to have eliminated the element of invitation.[75]

In *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*[76] this Court partially clarified the problem by holding that proof of conscious parallel action alone would not require a verdict of conspiracy in a civil jury case. And in *United States* v. *Twentieth Century-Fox Film Corp.*[77] the District Court for the Southern District of California said:

> "Conscious parallelism of action may be the basis of an inference of pre-existing agreement. However, where *positive* evidence is offered to show the origin of a policy and the business considerations which motivated its establishment, parallelism, conscious or unconscious, ceases to be the determinant. * * *" (Italics are the court's).[78]

In the instant case, petitioners introduced voluminous evidence of the non-collusive origins of the three delivered pricing methods and the business considerations which motivated their establishment. The Commission utterly ignored such evidence in its findings, although there was no contrary evidence. Unlike its *National Lead* case decision where it dwelt at length on evidence that the zone delivered pricing system had been *created* by agreement, the Commission's instant findings on the entire subject of delivered pricing were limited to: (i) descriptions of how each system worked,[79] (ii) a finding as to the Chain Institute's freight rate book used only in conjunction with Pittsburgh Plus,[80] and (iii) a finding that each

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[75] *Milgram* v. *Loew's, Inc.* (CCA-3, 1951), 192 F. 2d 579, 584; *Ball* v. *Paramount Pictures, Inc.* (CCA-3, 1948), 169 F. 2d 317, 319-321; *William Goldman Theatres* v. *Loew's, Inc.* (CCA-3, 1945), 150 F. 2d 738, 745.

[76] 346 U. S. 537 (1954).

[77] 137 F. Supp. 78 (S. D. Cal. 1955).

[78] *Ibid.* at p. 85.

[79] *Supra*, note 23.

[80] *Supra*, note 24.

chain manufacturer in using the delivered pricing methods knew that each of his competitors was also using them.[81] Petitioners had stipulated the existence of this common knowledge,[82] since no intelligent chain manufacturer could have failed to know of the existence of industry customs of more than 25 years' standing.

Based upon its finding of "conscious parallelism" the Commission drew the inference that there must "*necessarily*" have been an agreement to continue to use the delivered pricing methods during the period of the alleged price-fixing conspiracy, or else the conspiracy would not have worked.[83] This, we submit, was a *non sequitur*. It was no more "necessary" that there be an agreement to continue the particular delivered pricing methods than that there be an agreement to continue selling welded chain by the pound, weldless chain by the foot and tire chains by the pair or to continue any other normal trade custom. A change in one of the delivered pricing methods or in any other custom might have necessitated some modification of the alleged price-fixing agreement, but it would hardly have terminated it. As the Commission found, several of the petitioners did make changes in their methods of delivered price selling,[84] but the Commission did not find that this brought the alleged price-fixing conspiracy to an end or diminished its effectiveness.

The question is whether "conscious parallelism" will support an inference of agreement to continue the use of pre-existing trade customs during the period of an alleged price-fixing conspiracy, where there is positive evidence of the non-collusive origins of the customs and the business considerations which motivated their establishment. This is an important question of Federal law which has not been, but should be, settled by this Court.

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[81] *Supra*, note 25.
[82] R. 702.
[83] *Supra*, note 26.
[84] *Supra*, note 16.

Conclusion

In closing, we summarize for the Court's convenience the important factual distinctions between the *Lead* case and this case, as hereinbefore brought out:

Lead Case	*This Case*
1. Zone system had no existence prior to price-fixing conspiracy.	Delivered pricing methods had long non-collusive histories prior to any price-fixing.
2. Zone system *created* by agreement as part of price-fixing conspiracy.	Delivered pricing methods entirely non-collusive in origin, having sound business reasons for their genesis and development.
3. Zone system "bizarre", "highly artificial", incapable of existence without conspiracy.	Delivered pricing methods normal; and existed for many years in absence of any price-fixing.
4. Order prohibits individual use only of one delivered-pricing system—zone system.	Order prohibits all known practical delivered pricing methods available to small manufacturers, leaving only expensive f. o. b. truck, warehouse or factory pricing.
5. Order does not prevent meeting of distant competitors' prices.	Practical effect of order is to prevent meeting of distant competitors' prices, except un-"systematically", whatever that means.
6. Order does *not* prohibit sole method of pricing acceptable to customers.	In prohibiting Universal Delivered Price Method, order prohibits petitioners from using only method on which their jobber-customers will buy; but powerful and diversified competitors not subject to order may still use that method.
7. Order does not prevent members of industry from selling in geographical areas of greatest demand.	Order prevents tire chains from being sold in areas of heaviest snowfall except by factory located there.

8.	Commission gave full consideration to questioned paragraph of order and showed by its decision that it had done so.	Commission's decision was entirely silent as to third ordering paragraph or reasons for including it in order.
9.	*Lead* petitioners had opportunity to be heard on paragraph.	Petitioners had *no* opportunity to be heard on paragraph.

For the foregoing reasons, we respectfully submit that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Petitions to Review Order of Federal Trade Commission

No. 14,821

CHAIN INSTITUTE, INC., AMERICAN CHAIN & CABLE COMPANY, INC., THE McKAY COMPANY, HODELL CHAIN COMPANY, ST. PIERRE CHAIN CORPORATION, S. G. TAYLOR CHAIN COMPANY, COLUMBUS McKINNON CHAIN CORPORATION, CAMPBELL CHAIN COMPANY, NIXDORFF-KREIN MANUFACTURING COMPANY, PEERLESS CHAIN COMPANY, THE JOHN M. RUSSELL MANUFACTURING COMPANY, INC., TURNER & SEYMOUR MANUFACTURING COMPANY, WESTERN CHAIN PRODUCTS COMPANY, DENNIS A. MERRIMAN, WILLIAM D. KIRKPATRICK, and GEORGE J. CAMPBELL, JR.,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

[July 3, 1957.]

SUMNER S. KITTELLE (CANN, LAMB, LONG & KITTELLE; FRAZER F. HILDER, STEPHEN H. BEACH, WILKIE OWEN, FARR, GALLAGHER & WALTON; BEEKMAN & BOGUE; REED, SMITH, & McCLAY; McAFEE, GROSSMAN, TAPLIN, HANNING, NEWCOMER & HAZLETT; SIDLEY, AUSTIN, BURGESS & SMITH; MARSH, DAY & CALHOUN; LAWRENCE, GOLDBERG, LAWRENCE & LEWIN; FINCK & HUBER; HALFPENNY & HAHN; FREDERICK B. GERBER, and CHARLES FAY were with him on the briefs), for Petitioners.

J. B. TRULY, Attorney, Federal Trade Commission (EARL W. KINTNER, General Counsel, and ROBERT B. DAWKINS, Assistant General Counsel, Federal Trade Commission, were with him on the briefs), for Respondent.

Before: SANBORN, JOHNSEN and VOGEL, *Circuit Judges.*

SANBORN, *Circuit Judge.*

This case comes to this Court upon petitions to review a cease and desist order of the Federal Trade Commission [1] which is based upon its determination that the petitioners had conspired to bring about uniformity in prices for chain and chain products, in violation of Section 5 of the Federal Trade Commission Act.[2]

The petitioners are: the principal manufacturers of chain and chain products in the United States; the trade association of which they are members; and certain of the officers of the association. The Commission on December 22, 1942, issued a complaint charging them with having conspired to fix and maintain identical delivered prices for such products. Delivered prices are those charged by a seller for his goods when and where delivered. On October 9, 1945, the Commission issued an amended complaint which contained two counts. The first count charged the petitioners with conspiring, in violation of § 5 of the Federal Trade Commission Act, to fix identical delivered prices for their respective products by the use of the same delivered pricing methods, which are referred to as (1) a basing point system, (2) a freight equalization system, and (3) a zone system; and thereby preventing the forces of competition from making and determining price quotations.

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[1] The proceeding before the Commission is entitled, *In the Matter of Chain Institute, Inc., et al.*, Docket No. 4878. 49 F. T. C. 1041.

[2] 38 Stat. 719, as amended, 52 Stat. 111; 15 U. S. C. § 45.

The second count of the amended complaint charged the petitioners with price discrimination, in violation of § 2(a) of the Clayton Act, as amended.[3] That count was ultimately dismissed by the Commission. The petitioners denied all of the material allegations of the amended complaint. Evidence was heard by a Trial Examiner designated by the Commission. The hearings commenced in April of 1946 and continued through 1947 and into 1948. The record evidence was closed July 7, 1948. The Trial Examiner filed his recommended decision on September 23, 1948. It was later amended in some particulars. The case was argued before the Commission, on exceptions to the Trial Examiner's report, on April 7, 1949; was reargued September 22, 1950; and was finally decided by the Commission adversely to petitioners on the first count February 16, 1953, by a vote of 3 to 1, Commissioner Mason dissenting and Commissioner Carretta not participating. The cease and desist order under review was entered on the same date. In addition to the dismissal of the second count, the amended complaint was also dismissed as to several individuals who had been joined as parties. The record evidence necessarily reflects conditions in the chain industry as they existed prior to July 1948.

The petitioners on April 20, 1953, filed their "Joint and Several Petition to Review" the order of the Commission. The John M. Russell Manufacturing Company, Inc., and Turner & Seymour Manufacturing Company, who were parties to the joint petition, filed a supplemental petition to review the order, asserting, in effect, that there was no adequate evidentiary basis for a finding that they had participated in a conspiracy to fix prices. They asked that the relief prayed for in the joint petition be granted. The petitioners originally all sought a complete review and reversal of the Commission's findings and order. On June 17, 1954, they (with the exception of the two petitioners who had filed the supplemental petition and the Columbus

[3] 38 Stat. 730, 49 Stat. 1526; 15 U. S. C. § 13.

McKinnon Chain Corporation) moved this Court for leave to withdraw their challenge to the Commission's findings and order with respect to the price fixing conspiracy charge, except as such findings and order bore upon the use of the delivered pricing methods.

The cease and desist order of the Commission prohibited broadly a continuation of the price fixing conspiracy which the Commission had found to exist. Included in this part of the order was a subparagraph numbered (6) requiring the petitioners who make or deal in chain to cease and desist from entering into or continuing any common course of action, agreement or conspiracy to

> "Quote or sell chain or chain products at prices calculated or determined pursuant to or in accordance with the single basing point delivered-price system, the freight equalization delivered-price system, or the zone delivered-price system; or quote or sell chain or chain products at prices calculated or determined pursuant to or in accordance with any other plan or system which results in identical price quotations or prices for chain or chain products at points of quotation or sale or to particular purchasers by any two or more sellers of chain or chain products using such plan or system or which prevents purchasers from finding any advantage in price in dealing with one or more as against another seller."

In addition, the Commission included in the order a third ordering paragraph. That paragraph required each of the corporate petitioners to

> "cease and desist from quoting or selling chain or chain products at prices calculated or determined pursuant to or in accordance with a single basing point delivered-price system, a freight equalization delivered-price system, or a zone delivered-price system, for the purpose or with the effect of systematically matching the delivered-price quotations

or the delivered prices of other sellers of chain or chain products and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another."

The validity of both of these paragraphs of the order is challenged as being without adequate evidentiary support and exceeding the powers of the Commission.

The case was argued and submitted to this Court at its March Session 1956. The Court of Appeals for the Seventh Circuit had just decided the case of *National Lead Co.* v. *Federal Trade Commission*, 227 F. 2d 825, which also involved an alleged conspiracy to fix prices. The Commission in its cease and desist order in that case had included a paragraph similar to the third ordering paragraph in this case, forbidding the respondents there involved "from quoting or selling lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price sytem for the purpose or with the effect of systematically matching the delivered price quotations or the delivered prices of other sellers of lead pigments and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another." 227 F. 2d, at page 840. The Seventh Circuit ruled that that paragraph of the order was invalid. See pages 840-844 of 227 F. 2d. In his argument, in the instant case, counsel for the Commission conceded that if that ruling was correct, the corresponding paragraph in the order under review here could not be sustained. Moreover, Commissioner Mason, who had dissented in both the *National Lead Co.* case and this case, had said in his dissenting opinion, with respect to the order now under review: "The order in this case, like the order in Docket 5253, *National Lead Company, et al.*, goes further than to suppress practices found to be unlawful." We therefore deferred decision pending final disposition of the *National Lead Co.* case, in which the Supreme Court granted certiorari. That Court on Feb-

ruary 25, 1957, in *Federal Trade Commission* v. *National Lead Co.*, 352 U. S. 419, ruled that it was within the power of the Commission, under the evidence in that case, to include the paragraph corresponding to the third ordering paragraph in the instant case.

After the decision of the *National Lead Co.* case by the Supreme Court, the parties here, at our invitation, filed supplemental briefs relative to the effect, if any, of that decision upon the questions which we are called upon to decide, and specifying what those questions are.

The petitioners in their supplemental brief say that the Supreme Court merely decided in the *National Lead Co.* case that the Commission had basic statutory authority to include in its order a paragraph of the type there in question, forbidding the use of a single delivered pricing system, and that, as narrowly interpreted, the paragraph in that case was not an inappropriate remedy under the peculiar facts.

In our opinion, there are three questions requiring determination: (1) The validity of the prohibition contained in subparagraph (6) of the first ordering paragraph, prohibiting the continued use, pursuant to conspiracy, of the three delivered pricing systems. (2) The validity of the third ordering paragraph, prohibiting the individual independent use of any of the three delivered pricing systems "for the purpose or with the effect of systematically matching" delivered prices of competitors, with the effect of eliminating competition. (3) Whether there was an adequate evidentiary basis for the finding of the Commission that Columbus McKinnon Chain Corporation was a participant in the alleged conspiracy to fix prices.

The petitioners in their supplemental brief say that Turner & Seymour Manufacturing Company and The John M. Russell Manufacturing Company, Inc., as well as Columbus McKinnon Chain Corporation, have challenged the entire findings, conclusions and order. The latter company has filed a brief. Neither of the other two has

briefed or argued its assertions of error. As was said in *Kimball Laundry Co.* v. *United States*, 8 Cir., 166 F. 2d 856, 859, "An unargued assertion of error is no more helpful to an appellate court than is an unsupported allegation of fact to a trial court. The burden of demonstrating error is upon an appellant, and errors assigned, but not argued in his brief, are waived." See, also, *Turner County, S.D.* v. *Miller*, 8 Cir., 170 F. 2d 820, 828.

Since the petitioners do not challenge the adequacy of the evidence to sustain the Commission's determination of the existence of concerted action by the petitioners, amounting to conspiracy, to fix the prices for chain and chain products, it is unnecessary to attempt to state the evidence in detail. What the petitioners contend is that there was no evidence that the delivered pricing methods used in the sale of the chain or chain products resulted from any conspiracy, understanding, agreement or concerted action on the part of the petitioners.

There is no doubt of the power of the Commission to declare that conduct which tends to restrain trade by fixing prices is an unfair method of competition. *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 693. Within broad limits, it is for the Commission to prescribe the remedy for the prevention of such conduct, which may include depriving those who have engaged in it of the weapons which they used in making it effective. *Federal Trade Commission* v. *National Lead Co.*, *supra*, pages 428-430 of 352 U. S. See, also, *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 473.

The instant case strongly resembles the *Cement Institute* case, 7 Cir., 157 F. 2d 533, reversed in 333 U. S. 683; the *National Lead Co.* case, 227 F. 2d 825, reversed in part 352 U. S. 419; and the case of *Triangle Conduit & Cable Co., Inc.* v. *Federal Trade Commission*, 7 Cir., 168 F. 2d 175, affirmed by an equally divided Supreme Court under the title, *Clayton Mark & Co.* v. *Federal Trade Commission*, 336 U. S. 956. The only important distinction between the instant case and those cases, it seems to us, is

that here three delivered pricing systems are involved, and in each of the other cases only one was involved.

The record shows that the three delivered pricing systems or methods were used in selling chain. Welded chain (heavy-duty chain such as anchor chain, logging chain and the like) was sold under the old "Pittsburgh plus" method of delivered pricing, which called for the f. o. b. mill or factory price plus freight based on Pittsburgh. The method is described in the *Cement Institute* case at pages 697-698 of 333 U. S.

Weldless chain (which is lighter than welded chain and is made by bending and knotting wire into links or by cutting links from flat metal) was sold under the freight equalization method of computing delivered pricing. Under this system the buyer pays the seller's mill or factory price plus an amount equal to the rail freight applicable to the shipment from the factory, in which such chain is made, nearest freightwise to the point of delivery.

Tire chain (which consists of two welded line or side chains with cross links and is used on the wheels of motor vehicles to prevent skidding on or in snow, ice or mud) was sold f. o. b. factory with freight allowed or absorbed by the seller to all destinations in the United States. This the Commission calls a zone delivered price system, the entire United States being the zone. The petitioners prefer to call the system "the universal delivered price method." All that this means is that tire chains, like chewing gum, cigarettes, and many other products, are sold everywhere at the same delivered prices, regardless of point of origin.

The Commission, in substance, found that the petitioners entered into agreements and understandings concerning current and future prices; that they cooperatively compiled schedules of common pricing factors used in selling welded chain; that they adopted and used, by agreement, the prices and discounts published by the American Chain & Cable Company, Inc., the largest manufacturer of chain in the United States; that they exchanged information as

to prices at which their products were offered for sale generally and as to prices made particular customers; and that they promoted adherence to prices agreed upon through the Chain Institute and otherwise.

The Commission further found that

> "Each of the * * * manufacturers has quoted and sold chain and chain products at prices calculated pursuant to and in accordance with the particular method or system of computing delivered prices applicable to the products it sold, with the knowledge that all the other * * * manufacturers selling the same products were simultaneously doing likewise. In entering into and engaging in the cooperative and collective actions described hereinabove, there was necessarily an understanding and agreement between all of the respondents [before the Commission] that each of the * * * manufacturers would continue to use the particular method or system applicable to the type or types of chain each sold."

The Commission also found:

> "* * * All users of each of the three methods or systems of computing delivered prices have thus been enabled to present to a prospective purchaser a condition of matched prices in which such purchaser was isolated and deprived of any choice on the basis of price. The delivered costs to purchasers have not reflected any of the differences in cost of raw materials, other items, or freight delivery from the places of manufacture to the purchaser's delivery points. The principles and forces of competition have been prevented from making and determining the prices of each of the * * * manufacturers."

One not learned in unfair trade practices and unfair methods of competition might, from the record in this

case, get the impression that the Commission's findings presented a somewhat overdrawn and unduly sinister picture of the situation out of which this controversy arose. We think, however, that there was a sufficient evidentiary basis for an inference by the Commission that the substantial uniformity and virtual identity of prices which existed in the chain industry resulted from concerted conscious action on the part of petitioners, amounting to conspiracy, and that the delivered pricing methods used by petitioners in connection with and in furtherance of their cooperative and collusive efforts to fix or stabilize prices for chain were necessarily an inherent and indispensable part of the conspiracy.

In the *Cement Institute* case it was asserted, as it is here, that the Commission failed to find, and that the evidence failed to show, any agreement to use the delivered price system involved in that case. See page 709 of 333 U. S. This contention was rejected by the Supreme Court.

The contention of petitioners that subparagraph (6) of the first ordering paragraph is invalid and unjustified by the evidence, cannot be sustained. The Supreme Court held in the *Cement Institute* case that a similar paragraph was valid. The Court said (page 729 of 333 U. S.): "The paragraph is merely designed to forbid respondents from acting in harmony to bring about national uniformity in whatever fashion they may seek by collective action to achieve that result."

It is evident that it is the third ordering paragraph by which the petitioners are most aggrieved and which they seem to construe as totally and permanently disabling each of them from selling its chain products at delivered prices, and leaving them no alternative but to sell at prices f. o. b. their respective factories. They say this will prevent them from engaging in country-wide competition and confine each of them to its own local trade territory. If this paragraph of the order of the Commission were to be

given the effect of depriving each of the petitioners of every lawful and practical method of independently and honestly selling its products at delivered prices, and thus preventing it from engaging in nationwide competition, we would consider the paragraph invalid.

The only distinction between the third ordering paragraph in this case and the corresponding paragraph in the *National Lead Co.* case is that there the order proscribed the use of the zone delivered price system, which was the only delivered price system in question in that case, while in this case the Commission was dealing with three delivered price systems, each of which was used in computing the price of a single type of chain. In its supplemental brief, the Commission says:

> "While the use of each system was limited in the past to a particular type of chain, each has been equally effective in restraining trade and eliminating competition. The order, we think, properly guarded against the use of the simple device of interchanging the systems used as among the three types of chain, and thus perpetuating the restraints of trade at which the order is directed. The Commission has frequently issued orders which have consistently been upheld by the Courts, prohibiting unfair methods and practices as to all products sold in cases where the methods and practices had been used in the past only in connection with the sale of one of the products."

It is possible that the Commission has made its order too broad in undertaking to proscribe the qualified independent use by each of the petitioners of the only practical systems of delivered pricing for its chain products. If in the *National Lead Co.* case the Commission had prohibited not only the individual use of the single delivered price system there involved, but had also conditionally prohibited the use of all other practical delivered price

systems, the Supreme Court might have refused to sustain so broad a prohibition.

In *Federal Trade Commission* v. *Ruberoid Co., supra,* page 473 of 343 U. S., the Supreme Court, in sustaining an order of the Commission, said:

> "* * * Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future. In carrying out this function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity. Moreover, 'the Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices' disclosed. *Jacob Siegel Co.* v. *Federal Trade Comm'n,* 327 U. S. 608, 611 (1946). Congress placed the primary responsibility for fashioning such orders upon the Commission, and Congress expected the Commission to exercise a special competence in formulating remedies to deal with problems in the general sphere of competitive practices. Therefore we have said that 'the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.' Id., at 613."

We gather from this and the other recent Supreme Court decisions to which reference has been made, that, unless an order of the Commission can be said to be purely arbitrary because without adequate evidentiary support or because clearly beyond the Commission's powers, it

may not be set aside. The question of the adequacy of the evidentiary basis for the third ordering paragraph as applied to all types of chains and to every petitioner, whether it had used all of the three delivered price systems or not, is, to say the least, debatable. But if the Commission honestly and justifiably believed that competition in the chain industry had been virtually destroyed by the conduct of petitioners and that the third ordering paragraph was necessary to restore competitive prices, we cannot say that the Commission's determination in that regard was purely arbitrary. The Commission, in cases such as this, is the trier of the facts, the appraiser of the credibility of witnesses, the weigher of evidence, the drawer of inferences, and, within broad limits, the prescriber of remedies for trade practices found by it to be unfair. Its determination as to the facts is as invulnerable to attack as is a jury verdict in a case triable by and properly submitted to a jury. It seems apparent that, unless a reviewing court can demonstrate that the Commission's order is legally or factually baseless, it may not be set aside.

The scope of the third ordering paragraph in the instant case is, of course, the same as was the scope of the corresponding paragraph in the *National Lead Co.* case, with respect to which the Supreme Court said, page 431 of 352 U. S.:

> "* * * It is our conclusion that the order was not intended to and does not prohibit or interfere with independent delivered zone pricing *per se*. Nor does it prohibit the practice of the absorption of actual freight as such in order to foster competition. Furthermore, as we have said there is read into the order the provision of § 2(b) of the Clayton Act as to the right of a seller in good faith to meet the lower price of a competitor. This is not to say that a seller may plead this section in defense of the use of an entire pricing system. The section is designed to protect competitors in individual transactions."

Moreover, the Commission does not place the same construction on the paragraph as do the petitioners. In its supplemental brief the Commission says:

> "The order here does not require f.o.b. mill selling. As the Supreme Court pointed out in *National Lead*, 'delivered zone pricing violates the order only when two conditions are present: (1) identical prices with competitors (2) resulting from zone delivered pricing' (1 L. ed. 2d at 443). So, here, the order will be violated only if there are identical prices resulting from single basing point, freight equalization or zone delivered pricing. As we pointed out in our main brief, the order does not prohibit *per se* the use of any delivered price-system and can be fully complied with by competition in base prices, no matter what system of delivered pricing is used. If there is competition in base prices there cannot possibly be any 'systematic matching' of delivered prices."

Furthermore, if conditions have changed and the third ordering paragraph is no longer needed to restore competition to the chain industry, it seems fair to assume that the Commission will, upon application, reopen the proceeding under Section 5(b) of the Federal Trade Commission Act as amended, and modify its order. See *American Chain & Cable Co., Inc.* v. *Federal Trade Commission*, 4 Cir., 142 F. 2d 909, 911-912.

Columbus McKinnon Chain Corporation in its brief asserts that an adequate evidentiary basis for the Commission's finding that the company was involved in the conspiracy is lacking. The company points to the fact that it made no weldless chain, although it at times purchased small amounts of such chain for resale as an accommodation to its customers; that such resales were usually priced f.o.b. its factory at Tonawanda, New York, and rarely, when shipped with other chain, f.o.b. Pittsburgh; that about 95% of the tire chain sold by the company was its

own patented "claw chain", the published price of which differed from the prices of tire chain of other petitioners; that, while in selling its patented tire chain it independently adopted the universal delivered price method, the use of that method did not result in "any regular identity of price with" the tire chain of other petitioners; that when the company entered the tire chain business it adopted the pricing practices of established manufacturers; and that the only way to compete for tire chain sales was by the universal price method, "Because of the homogeneity of the product and the peculiarly sporadic geography of the tire chain market."

Columbus McKinnon asserts that the Commission's inference of its complicity is based on: (1) its membership in the Chain Institute, and (2) the similarity of its prices on welded chain to those of competing manufacturers. It contends that, considered in proper perspective, those facts do not justify the inference, and that mere membership in a trade association, without more, is not enough to establish participation in a conspiracy. It cites, in that connection, *Phelps Dodge Refining Corp.* v. *Federal Trade Commission*, 2 Cir., 139 F. 2d 393, 396. We note that in that case the court went on to say:

> "* * * Thus the issue is reduced to whether a member who knows or should know that his association is engaged in an unlawful enterprise and continues his membership without protest may be charged with complicity as a confederate. We believe he may. Granted that his mere membership does not authorize unlawful conduct by the association, once he is chargeable with knowledge that his fellows are acting unlawfully his failure to dissociate himself from them is a ratification of what they are doing. He becomes one of the principals in the enterprise and cannot disclaim joint responsibility for the illegal uses to which the association is put.

> While the culpable role of petitioner Cyanamid is less clearly established than that of the three petitioners already considered, it nevertheless sustains the Commission's findings."

The record shows that the Columbus McKinnon Chain Corporation was an active member of the Chain Institute from its inception, and followed the delivered pricing methods of other petitioners at least with respect to unpatented tire chain and welded chain.

The Commission, we think, reasonably could infer that Columbus McKinnon Chain Corporation, as a member of the Chain Institute, knew or was charged with knowledge of the collusive efforts of other members to stabilize prices for chain and chain products by suppressing competitive pricing, and was therefore a party to the conspiracy. Compare, *Federal Trade Commission* v. *Cement Institute*, supra, pages 717-720 of 333 U. S.

The order under review is affirmed, and an order of enforcement may be entered.

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 14821—September Term, 1956

Friday, July 19, 1957.

CHAIN INSTITUTE, INC., et al.,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

Chain Institute, Inc., American Chain & Cable Company, Inc., The Bridgeport Chain & Manufacturing Company, The McKay Company, Hodell Chain Company, St. Pierre Chain Corporation, S. G. Taylor Chain Company, Cleveland Chain & Manufacturing Company, Columbus McKinnon Chain Corporation, Campbell Chain Company, Nixdorff-Krein Manufacturing Company, Peerless Chain Company, Round California Chain Company, The John M. Russell Manufacturing Company, Inc., Seattle Chain & Mfg. Company, Turner & Seymour Manufacturing Company, Western Chain Products Company and Woodhouse Chain Works, corporations, and Dennis A. Merriman, William D. Kirkpatrick and George J. Campbell, Jr., individuals, having on April 20, 1953, filed in this Court their joint petition to review an order to cease and desist issued on February 16, 1953, by the Federal Trade Commission in a proceeding before the said Commission entitled "In the Matter of Chain Institute, Inc., et al., Federal Trade Commission Docket No. 4878" (reported in 49 F. T. C. Dec. 1041); and The John M. Russell Manufacturing Company, Inc., and Turner & Seymour Manufacturing Company having on April 20, 1953, filed

in this Court their supplemental petition to review the said order to cease and desist; and petitioners, except The John M. Russell Manufacturing Company, Inc., Turner & Seymour Manufacturing Company and Columbus McKinnon Chain Corporation, having by motion filed June 17, 1954, withdrawn certain of the points relied upon in their said joint petition to review; and, pursuant to motion consented to by the respondent, the joint petition to review having on September 23, 1955, been dismissed by the Court as to the Bridgeport Chain & Manufacturing Company, Cleveland Chain & Manufacturing Company, Round California Chain Company, Seattle Chain & Mfg. Company and Woodhouse Chain Works; and the cause having been heard by this Court on briefs and oral argument; and the Court having on July 3, 1957, filed its opinion affirming the Commission's said order to cease and desist and directing the entry of an enforcement decree:

Now, Therefore, it is hereby ordered, adjudged and decreed that the said order to cease and desist be, and it hereby is, affirmed and enforced, and petitioners are commanded to obey the same and comply therewith.

It is further ordered, adjudged and decreed that petitioners shall, within ninety days after entry of this decree, file with the Federal Trade Commission a report in writing setting forth in detail the manner and form in which they have complied with the said order to cease and desist.

Without prejudice to the right of the Federal Trade Commission, respondent herein, to institute and maintain such proceedings for violation of its order to cease and desist and of this decree as may be warranted by law, this Court retains jurisdiction of this cause to enter such further orders or decrees herein from time to time as may become necessary.

July 19, 1957.

.....

Motion of Bridgeport Chain & Manufacturing Company, *et al.*

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Civil No. 14821

CHAIN INSTITUTE, INC., et al.,

Petitioners,

against

FEDERAL TRADE COMMISSION,

Respondent.

MOTION OF PETITIONERS THE BRIDGEPORT CHAIN & MANUFACTURING COMPANY, CLEVELAND CHAIN & MANUFACTURING COMPANY, ROUND CALIFORNIA CHAIN COMPANY, SEATTLE CHAIN & MFG. COMPANY, AND WOODHOUSE CHAIN WORKS TO DISMISS AS TO THEM THE PETITION FOR REVIEW FILED HEREIN ON APRIL 20, 1953

Now come The Bridgeport Chain & Manufacturing Company, Cleveland Chain & Manufacturing Company, Round California Chain Company, Seattle Chain & Mfg. Company, and Woodhouse Chain Works, petitioners herein, by their attorneys, and upon the annexed affidavit of Elden T. Davis, sworn to August 22, 1955, and upon the record herein as certified to this Court by the Federal Trade Commission on or about January 12, 1954, and upon all of

the proceedings had herein before this Court and before the Federal Trade Commission, and pursuant to Rules 18 and 4(d) of the Rules of this Court,

RESPECTFULLY MOVE this Court to dismiss as to them the Joint and Several Petition to Review Order of Federal Trade Commission which was filed and docketed in this Court in this proceeding on April 20, 1953, as modified by Motion for Leave to Withdraw Certain Points Relied Upon, and Certain Portions of The Prayer dated June 15, 1954 and filed and docketed in this Court on June 18, 1954, such dismissal to be without prejudice to or effect upon the remaining petitioners (other than these moving petitioners) which are parties to said petition.

AS GROUNDS FOR THIS MOTION, these moving petitioners respectfully show this Court and allege:

1. That, on July 23, 1954, they sold all of their machinery and equipment for the manufacture of chain and chain products, together with all of their inventories, trade marks and goodwill incident to their business in chain and chain products, to Republic Steel Corporation, a corporation not connected in any way with these moving petitioners.

2. That, since said date, these moving petitioners have not been engaged in the chain or chain products business and have no intention of engaging in that business in the foreseeable future.

3. Accordingly, the cease and desist order will have no effect on these moving petitioners and is moot as to them. Therefore, they are unwilling to spend the time and money necessary further to prosecute the said Joint and Several Petition to Review, as modified by Motion for Leave to Withdraw Certain Points Relied Upon, and Certain Portions of The Prayer dated June 15, 1954 and filed and

docketed in this Court on June 18, 1954, and are willing that the same be dismissed as to them.

Dated: September 14, 1955.

Respectfully submitted,

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Sumner S. Kittelle,
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Frazer F. Hilder,
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New York, New York and
Washington, D. C.,

GANGER & GANGER,
Cleveland, Ohio,

STEPHEN H. BEACH,
New York, New York,
of Counsel.

The undersigned respondent, Federal Trade Commission, hereby consents to the entry of an order, upon the above motion, dismissing the Joint and Several Petition to Review Order of Federal Trade Commission as modified by Motion for Leave to Withdraw Certain Points Relied Upon, and Certain Portions of The Prayer dated June 15, 1954 and filed and docketed in this Court on June 18, 1954, as to petitioners The Bridgeport Chain & Manufacturing Company, Cleveland Chain & Manufacturing Company, Round California Chain Company, Seattle Chain & Manufacturing Company, and Woodhouse Chain Works.

Dated: September 14, 1955.

ROBERT B. DAWKINS,
Assistant General Counsel,
Federal Trade Commission,
Attorney for Respondent.

Affidavit of Elden T. Davis

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Civil No. 14821

CHAIN INSTITUTE, INC., et al.,

Petitioners,

against

FEDERAL TRADE COMMISSION,

Respondent.

STATE OF OHIO
COUNTY OF CUYAHOGA } ss.:

ELDEN T. DAVIS, being duly sworn, deposes and says that he is an officer, to wit, Vice President of The Bridgeport Chain & Manufacturing Company, Vice President of Cleveland Chain & Manufacturing Company, Vice President of Round California Chain Company, Vice President of Seattle Chain & Manufacturing Company and Vice President of Woodhouse Chain Works, and makes this affidavit in support of the annexed motion of said corporations, which are petitioners in the above-entitled cause, to dismiss as to them the Joint and Several Petition to Review Order of Federal Trade Commission which was filed and docketed in this Court on April 20, 1953;

That, on July 23, 1954, said corporations sold all of their machinery and equipment for the manufacture of chain and chain products, together with all of their inventories, trade marks and goodwill incident to their business in chain and chain products, to Republic Steel Corporation,

a corporation not connected in any way with any of said moving corporations.

That, since said date, said moving corporations have not been engaged in the chain or chain products business and have no intention of engaging in that business in the foreseeable future.

Accordingly, while said moving corporations agree with the other petitioners herein that the findings and cease and desist order of the Federal Trade Commission in this proceeding are not supported by evidence and are unlawful and should be set aside, said cease and desist order will have no effect upon said moving corporations and is moot as to them. Therefore, they are unwilling to spend the time and money necessary further to prosecute the said Joint and Several Petition to Review, and are willing that the same be dismissed as to them, such dismissal to be without prejudice to or effect upon the remaining petitioners (other than said moving corporations) which are parties to said Joint and Several Petition to Review.

WHEREFORE, affiant prays that said motion be granted.

/s/ ELDEN T. DAVIS.

Subscribed and sworn to before me
this 22nd day of August, 1955.

/s/ A. H. GANGER,
Notary Public.

A. H. GANGER, Notary Public
My commission expires Jan. 25th, 1956

Order Dismissing Petition for Review as to Bridgeport Chain & Manufacturing Company, *et al.*

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 14,821—September Term, 1955

CHAIN INSTITUTE, INC.; AMERICAN CHAIN & CABLE COMPANY, INC.; THE BRIDGEPORT CHAIN & MANUFACTURING COMPANY; THE McKAY COMPANY; HODELL CHAIN COMPANY; ST. PIERRE CHAIN CORPORATION; S. G. TAYLOR CHAIN COMPANY; CLEVELAND CHAIN & MANUFACTURING COMPANY; COLUMBUS McKINNON CHAIN CORPORATION; CAMPBELL CHAIN COMPANY; NIXDORFF-KREIN MANUFACTURING COMPANY; PEERLESS CHAIN COMPANY; ROUND CALIFORNIA CHAIN COMPANY; THE JOHN M. RUSSELL MAUNFACTURING COMPANY, INC.; SEATTLE CHAIN & MFG. COMPANY; TURNER & SEYMOUR MANUFACTURING COMPANY; WESTERN CHAIN PRODUCTS COMPANY; WOODHOUSE CHAIN WORKS; DENNIS A. MERRIMAN; WILLIAM D. KIRKPATRICK; and GEORGE J. CAMPBELL, JR.,

Petitioners,

VS.

FEDERAL TRADE COMMISSION.

JOINT AND SEVERAL PETITION TO REVIEW ORDER OF FEDERAL TRADE COMMISSION

There is before the Court motion of the petitioners The Bridgeport Chain & Manufacturing Company, Cleveland Chain & Manufacturing Company, Round California Chain Company, Seattle Chain & Mfg. Company, and Woodhouse Chain Works to dismiss as to them the joint and

several petition to review the order of the Federal Trade Commission which was filed and docketed in this Court in this proceeding on April 20, 1953, such dismissal to be without prejudice to or effect upon the remaining petitioners (other than these moving petitioners) which are parties to said petition. Entry of order of dismissal is consented to by counsel for respondent.

The prayer of the motion consented to is by the Court hereby granted and the joint and several petition in this matter to review the said order of the Federal Trade Commission is by the Court hereby dismissed as to the aforesaid moving petitioners.

September 23, 1955.

Commission's Supplemental Memorandum in Lead Case

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 63

FEDERAL TRADE COMMISSION,

Petitioner,

v.

NATIONAL LEAD COMPANY, THE SHERWIN-WILLIAMS COMPANY, THE EAGLE-PICHER COMPANY, and THE EAGLE-PICHER SALES COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL TRADE COMMISSION REGARDING SCOPE OF THE ORDER TO CEASE AND DESIST

(Filed Dec. 21, 1956)

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Solicitor General,

VICTOR R. HANSEN,
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CHARLES H. WESTON,
Attorney,
Department of Justice, Washington 25, D. C.

At the oral argument of this case, counsel for the Federal Trade Commission was requested to submit a further statement on behalf of the Commission setting forth its views as to the scope of a provision of the cease and desist order. In response to the Court's request, the Commission submits the following views:

The order provision in question reads:

> It is further ordered that each of the respondents, its officers, agents, representatives, and employees, in or in connection with the offering for sale, sale or distribution of lead pigments in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from quoting or selling lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system for the purpose or with the effect of systematically matching the delivered price quotations or the delivered prices of other sellers of lead pigments and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another.

The construction stated herein is derived from the terms of the provision itself and from the Commission's opinion (R. 3803-3820). For the Court's convenience the portion of this opinion dealing directly with this order provision is reproduced in an appendix to this memorandum.

Broadly stated, the purpose of the order provision under consideration was effectively to deprive respondents, for a temporary period, of the continued use of the zone delivered pricing method which the Commission found had been the key instrumentality used by respondents in the successful operation of their price conspiracy. The period of time during which the order would remain in effect, though not specifically fixed, was intended to be

sufficient to break the existing pattern of pricing and bring about the establishment of a method or methods of pricing independently arrived at through the forces of competition.

Pursuant to this purpose the order provision is directed solely to zone delivered pricing. It should be made completely clear that if respondents choose to adopt and use any of the several other methods of pricing which are in common use by others, this order provision would have no application whatsoever, for it is strictly limited to zone delivered pricing. No other form of pricing could possibly violate its terms.

The result sought might have been accomplished by simply prohibiting, for a limited and specified period of time, any use by respondents of zone delivered pricing methods in the sale of lead pigments. An alternative method, and the one used in this case, would be to prohibit for a limited period of time any respondent from matching prices with other sellers through the use of a zone delivered pricing system.

The characteristics of zone delivered pricing should be kept in mind. For the purposes of the order a "zone delivered price system" is a method of pricing based upon designated geographic areas (zones). A seller's prices within a single zone are the same throughout that zone. Customarily the prices are different in different zones and always different as between contiguous zones. Thus the only way that prices can be matched by the use of zone delivered pricing is for the zones established by different sellers to be in whole or in part identical and for the zone prices of different sellers to be identical in the zones which coincide or overlap.

The difference between an absolute prohibition of the use of zone delivered pricing methods for a specified time, and the order issued, is that latter is to some extent more flexible. In part this is due to the fact that this provision is intended to be operative only so long as necessary to

insure a restoration of price competition. In its opinion the Commission stated:

> "• • • If after competition is restored any of the respondents can make a proper showing to the Commission that this prohibition or any other prohibition in the order is no longer necessary or desirable, the Commission will, of course, at that time take such action as may be appropriate in the light of the facts and the law. (R. 3817) (*1)

Some flexibility as to possible continued use of zone delivered pricing results from the fact that the Commission did not, by indulging a presumption that no respondents would or could sell some products comparable with those of others at different prices, forbid zone pricing as such. It may be possible that by reason of product differences, varying consumer acceptance, or other considerations, some comparable products can and will be sold at different prices. If this should be the case, respondents could continue to use zone delivered pricing in selling such products.

Before there can be a violation of this order provision by any respondent, two things must coincide. There must be "matched" prices, which means prices identical with those of other sellers, and these must result from the use by such respondent of a zone delivered pricing plan or system.

Any matching of prices on competing lead pigments resulting from the use by a respondent of a zone delivered price system would be matching prices in accordance with such plan or system and would violate the terms of the order provisions. On the other hand if a respondent con-

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(*1) American Chain & Cable Co., Inc. et al. v. Federal Trade Commission, 142 F. 2d 909, 911-912. Cf. International Union of Mine, Mill & Smelter Workers, Locals 15, 17, 107, 108 and 111 (C. I. O.) et al. v. Eagle-Picher Mining & Smelting Co., et al., 325 U. S. 335, 342.

tinues to sell an industry product pursuant to a zone delivered pricing method but at prices which differ in zones which in whole or in part coincide in area with zones used by other sellers, this would not violate the terms of this order provision, even though the price differences were slight. In such a situation, if in some instances a seller departed from his zone delivered price with the result of matching the price of a competitor, this would not violate the terms of the order provision because the matching would not be according to the plan or system of zone delivered pricing.

This order provision will, for such period of time as it may be in effect, prevent any continuation of price matching by respondents through the use of zone delivered pricing. It seems entirely probable that respondents would use a different pricing method rather than risk violation of the order through the use of zone delivered pricing. Whether a different pricing method or zone pricing with different prices is used, it would be a method originating from competition instead of agreement.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1957

No. 554

CHAIN INSTITUTE, INC., AMERICAN CHAIN & CABLE COMPANY, INC., THE McKAY COMPANY, HODELL CHAIN COMPANY, ST. PIERRE CHAIN CORPORATION, S. G. TAYLOR CHAIN COMPANY, COLUMBUS McKINNON CHAIN CORPORATION, CAMPBELL CHAIN COMPANY, NIXDORFF-KREIN MANUFACTURING COMPANY, PEERLESS CHAIN COMPANY, THE JOHN M. RUSSELL MANUFACTURING COMPANY, INC., TURNER & SEYMOUR MANUFACTURING COMPANY, WESTERN CHAIN PRODUCTS COMPANY, WILLIAM D. KIRKPATRICK, and GEORGE J. CAMPBELL, JR.,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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CHARLES FAY, Esq.,
of Counsel.

IN THE

Supreme Court of the United States

October Term, 1957

No. 554

CHAIN INSTITUTE, INC., *et al.*,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

Material Misstatement of Fact in Respondent's Brief

On page 5 of its brief in opposition, in describing the Commission's findings, the respondent states that each manufacturer used the applicable delivered pricing methods "for the purpose and with the effect of matching delivered prices with other manufacturers at all destinations and thus eliminating competition" (citing pages 604-9 of the record). *Nowhere on those pages or elsewhere in the Commission's findings will any such finding as to the purpose or effects of the delivered pricing methods be found.* As we stated in our petition (p. 13), the normal and *lawful* object of a delivered pricing method is to permit a seller to meet (*i.e.*, match) the lower prices of other sellers whose plants are closer to the customer than his. But this is for the purpose of *enabling him to compete,* not for the purpose of "eliminating competition". The Commission's findings as to the delivered pricing methods were limited to those described in our petition, pages 7-8.

The Commission Did *Not* Give Adequate Consideration to Third Ordering Paragraph or Any Consideration At All to Its Economic Effects

Respondent quotes Commissioner Mead's concurring opinion upon the denial of petitioners' motion for rehearing to the effect that the Commission "considered a number of factors" in deciding on the third ordering paragraph (brief, pp. 8 & 13).[1] But the only *evidentiary* "factor" mentioned by Commissioner Mead was "conscious parallelism" (R. 669). In this respect, Commissioner Mead's opinion on the denial of rehearing in this case stands in sharp contrast to his opinion in the *National Lead* case (49 F. T. C. Dec. 791 at 884), wherein he stated that the selection of the remedy involved the consideration of "many factors, *including the history of the collective activity and the manner in which it originated.*" In the *Lead* case the history of the zone delivered pricing system was that it *originated by agreement.* In the instant case, the origin of each of the delivered pricing methods was entirely *non*-collusive (Pet., pp. 6-7 and maps). The historical factor, deemed so important to the remedy in *Lead*, was given no consideration whatsoever in this case.

In footnote 10, pages 13-14 of its brief, respondent cites the Commission's denial of petitioners' Exception No. 75 as evidence that the Commission considered the deleterious economic effects of enforced f.o.b. mill pricing. Petitioners had included, as paragraph 10(j) of their proposed findings, *evidentiary* findings as to such economic effects (R. 351). In Exception No. 75, however, petitioners excepted not only to the Examiner's failure to make such *evidentiary* findings but also to his failure to include in his recommended decision petitioners' proposed formal conclusion that the law had not been violated[2] (R. 506). In denying Exception No. 75, the Commission mentioned

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[1] Commissioner Mead emphasized that, in his concurring opinion, he was speaking only for himself (R. 669).

[2] Such proposed formal conclusion was in paragraph 11 of petitioners' proposed findings (R. 352).

only petitioners' proposed formal conclusion (of no law violation) *and did not show the slightest consciousness of petitioners' proposed* EVIDENTIARY FINDINGS (R. 574-575). Thus, despite what is said in respondent's brief, the Commission obviously did *not* give any consideration whatsoever to the economic effects of the third ordering paragraph.[3]

The Commission Accepts the Power of a Court of Equity But Not Its Responsibilities

Respondent's argument (brief, pp. 15-16) that it is not required to grant any opportunity to be heard on the form or substance of its orders shows that, while ready to accept the *power* of a court of equity under this Court's decision in the *National Lead* case,[4] it is unwilling to assume the responsibilities of such a court—at least in the instant proceeding. It is the well-established practice of a court of equity in important antitrust cases, after determining that the Government is entitled to injunctive relief, to grant a hearing on the form and substance of its order.[5]

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[3] Since the Commission denied Exception No. 75 only "insofar as [it] pertain[ed] to the Hearing Examiner's *conclusions*", the portion of the exception dealing with the Examiner's failure to make findings as to the economic effects of f.o.b. mill pricing was actually not passed upon at all (R. 575).

[4] *I.e.*, the power to prohibit *lawful* acts where necessary to prevent unlawful ones.

[5] In *United States* v. *U. S. Gypsum Company*, 340 U. S. 76, 85 (1950), this Court held that even if the defendants in a civil antitrust action had no evidence to repel the Government's case of violation of the statute, they nevertheless had the right to lay the facts before the Court that would be pertinent to the Court's decision on the terms of the decree, and extensive arguments were thereafter had in the lower court upon the terms of the decree (C. C. H. Trade Cases 1950-51, pp. 63,700 and 64,504).

Pertinently, 15 U. S. C. A. § 47 empowers Federal equity courts to refer the formulation of recommended antitrust decrees to the Federal Trade Commission. Upon the making of the Commission's report to the Court the parties are expressly allowed to file exceptions thereto "and such proceedings [are to be] had in relation thereto as upon the report of a master in other equity causes."

The Commission here inserted the third ordering paragraph without notice or opportunity to be heard; denied such opportunity when specifically requested by motion for rehearing; and now asserts that due process does not require it ever to grant such a hearing. This attitude is not only contrary to the practice in courts of equity but, as pointed out in Commissioner Carretta's dissent from the denial of petitioners' motion for rehearing (R. 680-681), *is contrary to the Commission's own practice in other cases.*

Principle of *Lead* Case Cannot Be Extended in Disregard of Economic Effects

Respondent argues that since this Court in the *Lead* case gave the Commission power to prohibit the zone system where only the zone system was used, if more than one method of selling is used in an industry in which price-fixing is found, *all* may be prohibited indiscriminately *regardless of the economic consequences.* To demonstrate the fallacy of this argument it is only necessary to ask one question: Suppose in an industry in which price-fixing had been found there was in use, in addition to all the known methods of delivered pricing, a practice of selling certain of the industry's products on a strictly f.o.b. factory basis. Could the Commission validly prohibit not only all delivered pricing but also f.o.b. factory pricing and thereby deprive the affected companies of *all* methods of selling their products?

CONCLUSION

We respectfully submit that a writ of certiorari should be granted to review the three questions presented by our petition, *i.e.*, (1) whether this Court's *Lead* decision justifies the third ordering paragraph *under the economic and other circumstances of the instant case;* (2) whether there

was a denial of due process in the issuance of the third ordering paragraph; and (3) whether a finding of "conscious parallelism" justifies an inference of agreement to continue previously non-collusive delivered pricing methods.

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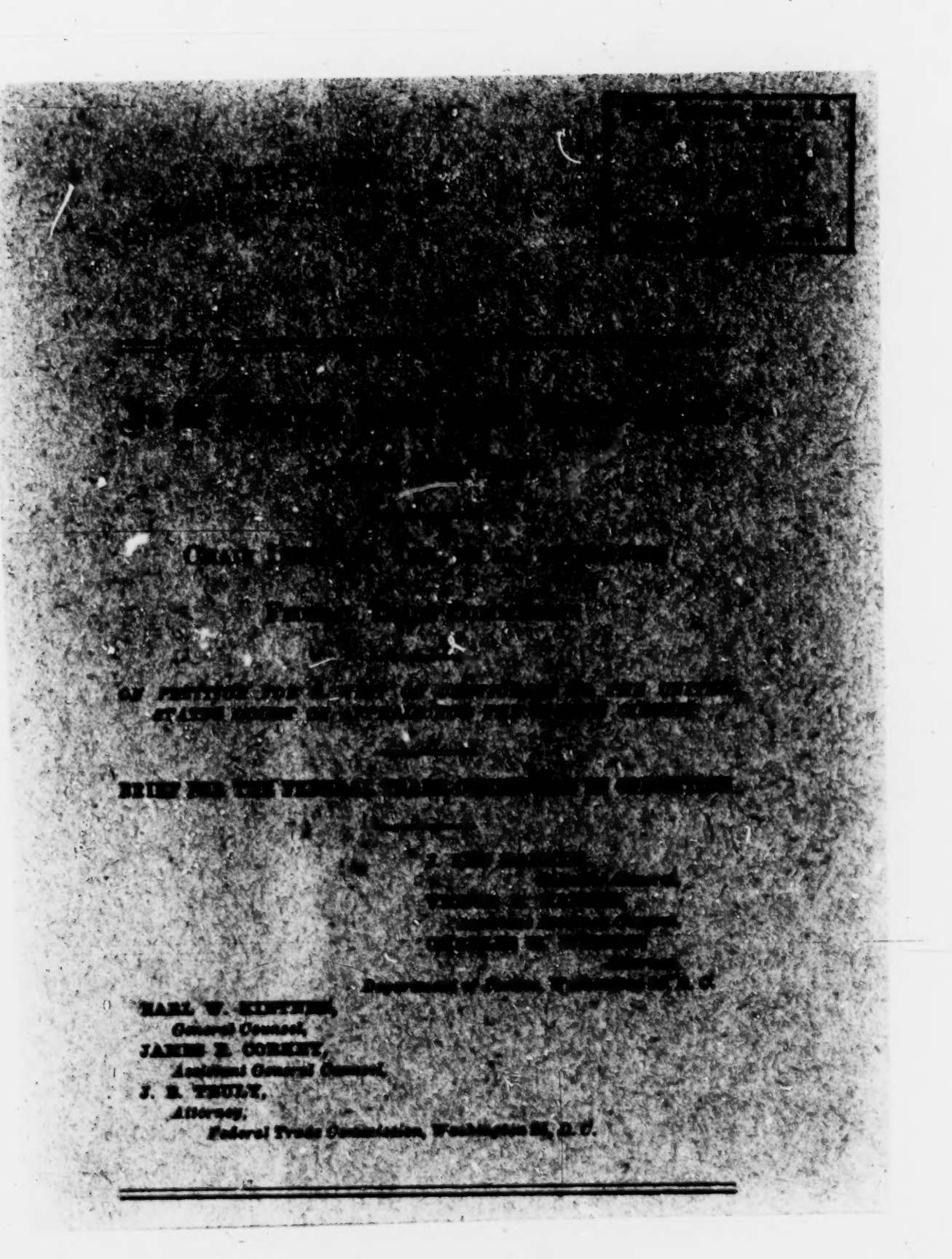

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 554

CHAIN INSTITUTE, INC., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 29–44) is reported at 246 F. 2d 231. The Commission's findings, conclusion and order and the dissenting opinion of Commissioner Mason (R. 592–622) are reported at 49 F. T. C. 1041, 1069–1110.

JURISDICTION

The judgment of the Court of Appeals (Pet. 45–46) was entered on July 19, 1957. The petition for a writ of certiorari was filed on October 16, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Commission, having found that petitioners have long been parties to a conspiracy to fix delivered prices, properly directed petitioners to cease and desist from continuing the use, pursuant to agreement, of the delivered price systems without which the purposes of the conspiracy could not have been accomplished.

2. Whether the Commission acted within its allowable discretion in directing the petitioners individually to cease and desist from selling any type of chain pursuant to a single basing point system, a freight equalization system or a zone price system, having the purpose or effect of systematically matching the delivered prices of other sellers.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. 45, provides in pertinent part as follows:

> (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> * * * * *
>
> (6) The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.
>
> (b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition * * * it shall

issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing * * *. * * * If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. * * *

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business * * *. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. * * *

STATEMENT

The Commission's amended complaint (R. 41–79) was issued in 1945 (R. 79). It charged in Count I (R. 41–71), under which the order was issued, that petitioners had violated Section 5 of the Federal Trade Commission Act by combining and conspiring to restrain and suppress competition in the sale of three types of chain, and that this was accomplished

primarily by agreeing upon published mill prices and by charging the same delivered price to buyers at any given location through the use as to "welded chain" of a single basing point delivered price system, as to "weldless chain" of a freight equalization delivered price system, and as to "tire chain" of a zone delivered price system (R. 52–55, 64–71). It charged that petitioners had "agreed to fix and maintain, and have fixed, maintained and made effective identical delivered price quotations" to buyers at any given location in the United States (R. 52), and that the use by each petitioner of the three delivered price systems had "prevented the principles and forces of competition from making and determining their respective price quotations" (R. 53). It charged that each seller of chain had employed the three delivered price systems with knowledge that each other seller "simultaneously does likewise" (R. 64), and that this was done "for the purpose and with the effect" of "matching" delivered prices on all types of chain (R. 65–69).

Count II of the amended complaint (R. 72–78), dismissed by the Commission (R. 652), charged that petitioners had sold their chain at discriminatory prices in violation of Section 2 (a) of the Clayton Act (15 U. S. C. 13 (a)).

After an extensive hearing, the Commission made detailed findings of fact (R. 592–652), and concluded that petitioners' agreements and understandings, and their acts pursuant thereto, violated Section 5 (R. 652), and issued its order to cease and desist (R. 653–657).

The Commission found that the petitioners sell "substantially all the welded chain, weldless chain, including sash and kindred chain, and tire chain produced in the United States" (R. 603).[1] They agreed with each other to sell chain at uniform delivered prices (R. 649–650). Each manufacturer, for the purpose and with the effect of matching delivered prices with other manufacturers at all destinations and thus eliminating competition, determined its delivered prices as to welded chain by the use of the Pittsburgh plus delivered price system,[2] as to weldless chain by the use of a freight equalization delivered price system under which every point of manufacture is a basing point, and as to tire chain by the use of a one-zone delivered price system (R. 604–9).

Petitioners do not contest the evidentiary support for the Commission's finding of an agreement to fix basic prices. They do contend, though the court below held to the contrary (Pet. 38), that there was no support for the Commission's finding (R. 650–651) that the delivered price systems, without which the purposes of the conspiracy could not have been accomplished, were used pursuant to agreement (Pet. 7).

Petitioners contest the validity only of subparagraph (6) of the first ordering paragraph and the

[1] While the case was pending in the Court of Appeals Republic Steel Corporation, not a party to the Commission proceeding, purchased the assets of five affiliated corporate manufacturers of chain which were parties, and the Court, pursuant to motion and with the Commission's consent (Pet. 47–52), dismissed the petition to review as to these five corporations (Pet. 53–54).

[2] The Commission found that since the commencement of the proceeding two petitioners had ceased using this system (R. 605).

third ordering paragraph of the Commission's cease and desist order (R. 653–657), both of which deal with the three delivered price systems. Subparagraph (6) of the first ordering paragraph prohibits petitioners from entering into or carrying out any planned common course of action, agreement or conspiracy to (R. 655)—

> Quote or sell chain or chain products at prices calculated or determined pursuant to or in accordance with the single basing point delivered-price system, the freight equalization delivered-price system, or the zone delivered-price system; or quote or sell chain or chain products at prices calculated or determined pursuant to or in accordance with any other plan or system which results in identical price quotations or prices for chain or chain products at points of quotation or sale or to particular purchasers by any two or more sellers of chain or chain products using such plan or system or which prevents purchasers from finding any advantage in price in dealing with one or more as against another seller.

The third ordering paragraph is identical in plan with the order reviewed by this court in *Federal Trade Commission* v. *National Lead Co.*, 352 U. S. 419, 423. It requires each manufacturer petitioner to cease and desist from (R. 656–657)—

> quoting or selling chain or chain products at prices calculated or determined pursuant to or in accordance with a single basing point delivered-price system, a freight equalization delivered-price system, or a zone delivered-price system, for the purpose or with the effect of systematically matching the delivered-price quota-

> tions or the delivered prices of other sellers of chain or chain products and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another.

The majority of the Commission did not issue a separate opinion to accompany its findings. In the *National Lead* case, which was decided by the Commission a little more than a month before the decision in this case, the Commission filed a lengthy opinion, prepared by Commissioner Mead, setting forth in detail the necessity for the provision in order to break up the conspiracy (49 F. T. C. 875–889). Commissioner Mason filed a dissenting opinion in that case (*id.*, 889–907). Commissioner Mason also filed a dissenting opinion in this case (R. 658–659), incorporating a portion of his opinion in the *National Lead* case (R. 659–662). He said that it was his belief that the third ordering paragraph was improperly included for the reasons he had objected to with respect to the inclusion of the comparable provision in the *National Lead* order.

A motion for rehearing was filed with the Commission and was denied (R. 663–665). The motion did not allege any change in fact or law, and the Commission denied it on the ground that it was largely predicated upon a change in membership of the Commission following the decision (R. 665–667). At the time of the order denying the motion Commissioner Mead was the only remaining member of the Commission who had voted with the majority in issuing the order to cease and desist (R. 665). He filed a concurring opinion on

the motion, stating in detail the reasons the third ordering paragraph had been included in the order (R. 668–674). His opinion stated that the prohibition was "necessary for effective relief from the conspiracy in which the respondents [petitioners] have engaged," and that the Commission "had the duty to determine the remedy necessary to suppress and insure against a revival of the trade-restraining conspiracy" (R. 669); that "we considered a number of factors" in determining the remedy; that "A majority of the Commission was of the opinion that an effective order" (R. 669–670) must prohibit not only the future use of the delivered-price systems pursuant to conspiracy, "but must also prohibit the individual use of a particular delivered pricing system or method" for the purpose or with the effect of systematically matching delivered prices of other sellers (R. 670); that "Such a prohibition was necessary * * * to make the order fully effective against the trade-restraining conspiracy," (R. 670) and that "an order merely prohibiting the combination may well be a useless gesture" (R. 671).

The Court of Appeals unanimously affirmed the Commission's findings, conclusion and order in every respect.

ARGUMENT

1. The Commission, having found that petitioners for many years had been parties to a price-fixing conspiracy, the existence of which is not contested,

[1] Some of the exhibits upon which the Commission relied in part in finding the existence of a conspiracy were dated in 1937 (R. 612-613, 628–630), antedating the Commission's order, issued in 1953 (R. 657), by sixteen years.

had the duty to prohibit the further use pursuant to agreement of the methods by which identity of delivered prices is accomplished. Delivered price systems, where used as a part of a scheme to fix prices and restrain trade, have many times been prohibited by the Commission in conspiracy orders which regularly have been affirmed by this Court and by courts of appeals.[4] Hence, the petition fails in this respect to present a question of federal law which has not been decided by this Court. And to the extent petitioners request further review of the evidence and inferences to be drawn therefrom, certiorari clearly is not warranted. *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 178.

Moreover, petitioners misconceive the basis for the Commission's finding that the three delivered price systems were employed pursuant to agreement (Pet. 23-25). The findings of conspiracy were not based on

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[4] Single basing point delivered price system: *United States Maltsters Ass'n.* v. *Federal Trade Commission*, 152 F. 2d 161 (C. A. 7); freight equalization basing point delivered price system: *Milk and Ice Cream Can Institute* v. *Federal Trade Commission*, 152 F. 2d 478 (C. A. 7); *Bond Crown & Cork Co.* v. *Federal Trade Commission*, 176 F. 2d 974 (C. A. 4); zone delivered price system: *Salt Producers Ass'n.* v. *Federal Trade Commission*, 134 F. 2d 354 (C. A. 7); *Fort Howard Paper Co.* v. *Federal Trade Commission*, 156 F. 2d 899 (C. A. 7), certiorari denied, 329 U. S. 795; *Allied Paper Mills* v. *Federal Trade Commission*, 168 F. 2d 600 (C. A. 7), certiorari denied 336 U. S. 918; *National Lead Company* v. *Federal Trade Commission*, 227 F. 2d 825 (C. A. 7), cross petition for certiorari denied, 351 U. S. 964; multiple basing point delivered price system: *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683; *Triangle Conduit & Cable Co.* v. *Federal Trade Commission*, 168 F. 2d 175 (C. A. 7), affirmed *sub nom. Clayton Mark & Co.* v. *Federal Trade Commission*, 336 U. S. 956.

conscious parallel action but on voluminous evidence of agreement. The Commission found that there was substantial evidence that "present and future prices * * * were discussed and agreed upon" on the occasion of meetings of petitioner Chain Institute, Inc., the trade association (R. 609–617); that pursuant to agreement published mill prices were identical at all times (R. 639–641); that a system of checking on the maintenance of delivered prices was fostered and carried out by the Institute (R. 618–628); that correspondence between petitioners showed the existence of an agreement to fix delivered prices (R. 628–632); that successful efforts to standardize and simplify products, which aided price fixing, were continuously carried on through the Institute (R. 632–637); that freight rates on welded chain from Pittsburgh to destinations throughout the United States were cooperatively compiled and used by petitioners and that the compilation was "not intended to serve any need for freight rate for shipping purposes but was designed for use in computing delivered prices * * *". (R. 637–639); that delivered prices on all types of chain have been "generally uniform" (R. 641) as a result of "the use of identical pricing systems or methods * * *" (R. 641–642).

The Commission plainly was entitled to find on this record, where the delivered price systems maintain uniformity of price, that the systems were used pursuant to agreement. As the Court of Appeals held, citing *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, the evidence supports the Commission's finding "that the delivered pricing methods

used by petitioners in connection with and in furtherance of their cooperative and collusive efforts to fix or stabilize prices for chain were necessarily an inherent and indispensable part of the conspiracy" (Pet. 38).[4] And the fact that the systems had been used historically in the industry since its inception is inconclusive because it is clear that they were used by agreement and understanding for the purpose and with the effect of eliminating price competition. As the Commission found, the purpose of arriving at identical delivered prices could not have been accomplished without the use of these systems (R. 650).[5]

The Commission did not exceed its authority, therefore, by ordering petitioners to discontinue the use pursuant to conspiracy of the methods of pricing and selling chain that in the past have been the means by which the unlawful restraints upon trade were accomplished.[6]

2. The Commission's authority in a conspiracy case to limit the individual use of a delivered price system, where necessary to destroy the impetus of the conspiracy, was settled by the Court's decision in *Federal Trade Commission* v. *National Lead Co.*, 352

[4] Two Courts of Appeals have said that "it taxes our credulity to believe, as argued, that petitioners employed this [freight equalization] system without any agreement or plan among themselves." *Milk and Ice Cream Can Institute* v. *Federal Trade Commission*, 152 F. 2d 478, 481-482 (C. A. 7); *Bond Crown & Cork Co.* v. *Federal Trade Commission*, 176 F. 2d 974, 980 (C. A. 4).

[5] The Court held in *Ethyl Gasoline Corporation* v. *United States*, 309 U. S. 436, 461, that the lower court "properly suppressed the means by which the unlawful restraint was achieved." See also *Federal Trade Commission* v. *National Lead Co.*, 352 U. S. 419, 430.

U. S. 419. Petitioners acknowledge this, but argue that for various reasons the decision in *National Lead* is not controlling here.[7]

It is asserted that since the third ordering paragraph here limits the use of three delivered price systems, as opposed to the limitation of the use of one such system in *National Lead*, it is too broad (Pet. 12–15). It is apparent that the *National Lead* order related only to the zone delivered price system because that was the only system used pursuant to conspiracy in the sale of lead pigments. The order here applies to the three systems because in the sale of chain petitioners pursuant to conspiracy have used all three systems. The Court of Appeals, in holding that the Commission made an allowable judgment in its choice of the remedy necessary in order effectively to bring to an end the past unlawful practices, recognized that the order properly guarded against interchanging, as among the three types of chain, the systems previously used, thus perpetuating the restraints of trade at which the order is directed (Pet. 39).[8]

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[7] Petitioners' argument that the pricing systems anteceded the conspiracy and agreement and therefore have an independent legitimate economic basis (Pet. 10–12) is discussed at page 11, *supra*.

[8] The possible interchange of pricing systems used may already have occurred as to welded chain. Petitioners say they believe that "the normal and lawful purpose and effect of any delivered pricing method" is systematically to match delivered prices of competitors (Pet. 13). They advise that the Pittsburgh plus system "is generally regarded as outmoded," and that "counsel are informed that the Pittsburgh Plus method is no longer used by any of the petitioners" (Pet. 11, n. 36). They do not inform the Court as to the method by which welded chain is currently priced.

Contrary to petitioners' contention (Pet. 19–21), the Commission did consider the necessity for the remedy selected.[9] Commissioner Mead, in his concurring opinion on the motion for rehearing, said that the Commission had fully considered the necessity for the third ordering paragraph (R. 668–674). He said that "we considered a number of factors" in determining the necessity of providing a remedy "to suppress and insure against a revival of the trade-restraining conspiracy" (R. 669). He also said that "A majority of the Commission was of the opinion that an effective order" must prohibit the individual use of the three delivered price systems "for the purpose or with the effect of systematically matching" delivered prices of other sellers of chain (R. 669–670). There is no basis, therefore, for petitioners' contention that the Commission gave no consideration to the necessity of the remedy.[10]

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[9] The petitioners specifically argue against the order as it applies to the zone system used in the sale of tire chain (Pet. 15–16). Under this system the petitioners' published mill prices are, pursuant to agreement, identical and the chain is sold at all delivery points in the United States at these published prices, the seller paying the freight. Chain, unlike chewing gum and cigarettes (Pet. 16), is a heavy commodity. The average cost of delivery of tire chain to all destinations in the United States is about 5½ percent of the published price (Pet. 12, fn. 37). As in the cases cited in footnote 4, page 9, *supra*, the Federal Trade Commission found that this system was part of the unlawful practice. The court below found that the Commission had a basis in the record for such a finding and had not abused its discretion in forbidding future use of the system. Under these circumstances there is no ground for review by this Court.

[10] Petitioners also argue that the Commission gave no consideration to the economic effects of the order, having contended throughout this proceeding that the order requires them to sell

Except that it applies to more than one delivered price system, the order here is to be interpreted in exactly the manner this Court interpreted the *National Lead* order. The order does not require f. o. b. mill selling and "delivered pricing *per se* is not banned by the order" (352 U. S. at 425).[11] As the Court said in *National Lead*, "delivered zone pricing violates the order only when two conditions are present: (1) identical prices with competitors (2) resulting from zone delivered pricing" (352 U. S. at 426). So, here, the order will be violated only if "systematically matching" prices result from a single basing point, freight equalization, or zone delivered price system.

Petitioners can comply with the order by competing instead of agreeing upon base prices. It will remain lawful to meet in good faith the lower prices of a competitor, no matter what system of delivered pricing is used. Here, as in *National Lead*, Section 2 (b) of the Clayton Act is fully applicable. As this Court

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f. o. b. mill. In this connection the record shows that under the conspiracy count of the complaint they requested the Hearing Examiner to find that an order requiring f. o. b. mill selling would be economically disastrous (par. 10 (j) of petitioners' proposed findings, R. 351[*], and excepted to the examiner's refusal to make the finding (exception 75, R. 506). The Commission specifically ruled upon and denied the exception (R. 574-575).

[11] The Court of Appeals recognized that the order does not *per se* prohibit the use of any delivered price system, saying (Pet. 38-39): "If this paragraph of the order of the Commission were to be given the effect of depriving each of the petitioners of every lawful and practical method of independently and honestly selling its products at delivered prices, and thus preventing it from engaging in nationwide competition, we would consider the paragraph invalid."

stated (352 U. S. 419, at 426–427, 431), it is read into every Commission order and the particular type of order, like the order here in question, "was not intended to and does not prohibit or interfere with independent delivered * * * pricing *per se*. Nor does it prohibit the practice of the absorption of actual freight as such in order to foster competition."

As to the duration of the third ordering paragraph, the order here is temporary in the same sense the order in *National Lead* was temporary. There the Court said: "When and if competition is restored and the individual prohibition is no longer necessary, the Commission expressed its intention, upon application, to vacate the * * * provision of its order" (325 U. S. at 424–425). So, here, Commissioner Mead said in his opinion on the motion for rehearing (R. 671–672):

> If, after competition is restored in the industry, any of the respondents can make a proper showing that this prohibition or any other prohibition in the order is no longer necessary or desirable, the Commission, of course, will at that time take such action as may be appropriate in the light of the facts and the law.

Petitioners also contend, as was contended in *National Lead*, that due process was denied because they had no opportunity to argue before the Commission the validity of the third ordering paragraph (Pet. 22–23). Here, as there, the insertion of the paragraph "was nothing more than a mode of implementation, selected by the Commission, to enforce its findings of violations of the Act" (352 U. S. at 427). The Commission is charged by the Federal Trade Commission

Act with fashioning the remedy. Since the reasonableness of the remedy depends upon the nature of the violation and the means adopted to accomplish it, the entire proceeding with respect to the violation is in substance a hearing on the remedy. Due process does not require a compartmentalization of the proceedings.

The Court of Appeals held that the Commission did not act arbitrarily or abuse its discretion by including the third ordering paragraph in the order (Pet. 40–41). Since this Court held in *National Lead* that the Commission's selection of an identical remedy had a "reasonable relation to the unlawful practices found to exist" (352 U. S. at 428), the petition presents no question of importance that has not been settled by the Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

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NOVEMBER 1957.

U. S. GOVERNMENT PRINTING OFFICE: 1957